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No. 2438

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a Corporation,
Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the
MERCHANTS' NATIONAL BANK OF
SEATTLE,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

JUL 29 1914

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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

No. 1.

JOHN W. SCHOFIELD, as Receiver of MER-
CHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Names and Addresses of Counsel.

FREDERICK BAUSMAN, Esq., Attorney for
Plaintiff, 1408 Hoge Building, Seattle, Wash-
ington.

DANIEL KELLEHER, Esq., Attorney for Plain-
tiff, 1408 Hoge Building, Seattle, Washington.

R. P. OLDHAM, Esq., Attorney for Plaintiff, 1408
Hoge Building, Seattle, Washington.

R. C. GOODALE, Esq., Attorney for Plaintiff, 1408
Hoge Building, Seattle, Washington.

B. S. GROSSCUP, Esq., Attorney for Defendants,
Bank of California Building, Tacoma, Washing-
ton.

CORWIN S. SHANK, Esq., Attorney for Defend-
ants, 1002 Alaska Building, Seattle, Washing-
ton.

W. C. MORROW, Esq., Attorney for Defendants,
Bank of California Building, Tacoma, Wash-
ington.

H. C. BELT, Esq., Attorney for Defendants, 1002
Alaska Building, Seattle, Washington. [1*]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MER-
CHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Second Amended Bill of Complaint.

To the Honorable Judges of the District Court of
the United States for the Western District of
Washington, Northern Division.

John W. Schofield of the City of Washington and
citizen of the District of Columbia, brings this his
bill against Charles H. Baker, a citizen and resident
of the State of New York, Algernon S. Norton, a
citizen and resident of the State of New York, and
Seattle Water Front Realty Company, a corporation
organized and existing under and by virtue of the

*Page-number appearing at foot of page of original certified Record.

laws of the State of Washington, and having its principal place of business at Seattle, in the State of Washington, and thereupon your orator complains and says:

FIRST.

By order and appointment of the Comptroller of the Currency of the United States, your orator is the duly appointed, qualified and acting Receiver of Merchants' National Bank of Seattle, Washington.

SECOND.

The said Merchants' National Bank of Seattle, [2] Washington, is, and was at all the times mentioned herein, a banking corporation organized and existing under and by virtue of the Acts of Congress of the United States relating to banking associations, and having its principal place of business at Seattle, in the Western District of Washington, Northern Division. On or about the 15th day of May, 1895, the Comptroller of the Currency of the United States became satisfied of the insolvency of said bank, and thereafter, after due examination of its affairs, did, on or about the 19th day of June, 1895, appoint defendant Charles H. Baker as receiver of said bank, and said defendant Baker thereupon accepted such appointment, and entered upon the performance of his duties as such receiver, and took possession of all the assets of said bank, and became and continued until April, 1899, the duly appointed, qualified, and acting receiver of said bank. In April, 1899, defendant Baker was compelled to resign, and did resign as such receiver, and the Comptroller of the Currency did thereupon appoint A. W. Frater as such receiver. On the 10th day of Feb-

ruary, 1913, A. W. Frater resigned as receiver of said Merchants' National Bank, and on the 12th day of February, 1913, your orator was by the Comptroller of the Currency of the United States appointed its receiver.

THIRD.

Among the assets which came into the hands of defendant Baker as receiver of said bank were certain lands in King County, in the State of Washington, which had been the property of said bank up to the time of his appointment as receiver. The bank, and defendant Baker as its receiver, had, under the laws of the State of Washington, a valuable preference right to purchase from the State of Washington [3] certain tide lands abutting thereon, comprising approximately twelve acres of ground, in King County, State of Washington, described and designated as Block 430 of Seattle Tide Lands, which tide lands are of great value, to wit, of the value of Three Hundred Thousand Dollars (\$300,000.00).

FOURTH.

On the 13th day of February, 1897, and at all times thereafter, the preference right to purchase said tide lands was of substantial value, and on said date the Comptroller of the Currency did authorize defendant Baker, as receiver, to purchase said tide lands from the State of Washington. Baker, as such receiver, did thereafter enter into a contract with the State of Washington, for the purchase of the same, and paid to the State all or several installments of the purchase price thereof from the funds of said estate in his hands as such receiver,

and the State of Washington issued to the Merchants' National Bank of Seattle its contract of sale covering Block 430 of Seattle Tide Lands, situated in King County, Washington, which contract provided, under and in accordance with the laws of the State of Washington, that upon payment in full of the consideration named in said contract, the State of Washington would issue to the Merchants' National Bank of Seattle, or its assignee, its deed in fee simple to said tide lands; and thereafter said Baker, as receiver for said bank, held said contract of purchase as one of the assets of said insolvent bank.

FIFTH.

Thereafter, and while acting as receiver of said insolvent bank, the defendant Baker purported, on behalf of said bank, to convey and assign said contract of purchase to one Sol G. Simpson, and this he did without actual consideration. [4] This assignment was dated November 26, 1897, but was not executed and acknowledged until January 19, 1898. In order to conceal the assignment of said contract, and to disguise its real nature, defendant Baker, on the 6th day of October, 1897, petitioned the Circuit Court of the United States for the District of Washington, Northern Division, in vague and general terms, for leave to sell certain bad and doubtful "bills receivable, overdrafts, stocks, bonds, securities, warrants and claims due upon the assessment levied upon the stockholders of said bank" at private sale, and on said date the Judge of said court made an order purporting to authorize and empower defendant Baker to compromise, compound, or sell at private sale, "all assets of said insolvent bank which

are in his judgment bad and doubtful, consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and other personal and chattel property and evidences of indebtedness; for cash, for such sum or sums as he, as such receiver, may be able to obtain, and as shall, in his judgment, be for the best interests of his said trust." Full and true copies of said petition and order are hereto annexed, marked Exhibits "A" and "B" respectively. The defendant Baker was, during 1897, an intimate friend of Sol G. Simpson, and did make use of said Simpson for the purpose of defrauding, and with the intent to defraud this estate of the tide land above described, to wit, Block 430 of Seattle Tide Lands, by a plan as follows: He arranged that Simpson should become the purchaser from himself, Baker, as receiver, of the right to purchase both Blocks 429 and 430, but with the secret agreement that Simpson should hold Block 430 for the use and benefit of defendant Baker as the real owner. This arrangement was carried out. [5] Simpson took over from defendant Baker both contracts, to wit, a contract for the purchase of Block 429 of Seattle Tide Lands, and the aforescribed contract for the purchase of Block 430, and took the latter solely for the use and benefit of the defendant Baker, and subject to a secret trust, under the terms of which he agreed that he himself had and should have no interest in Block 430, but should, upon demand, transfer the same to defendant Baker or his nominee. The sale and assignment of said contract was made by said Baker as receiver to Simpson without any

other or valid order of court directing the same, and without any authority from the Comptroller of the Currency regarding it.

Said assignment to Simpson was made by Baker for Baker's own use, without the knowledge or consent of the Comptroller, and for the purpose of secretly defrauding said insolvent bank, its creditors and stockholders, and said Simpson, during all the time that he held, or purported to hold, title to said property, held the same in trust for said Baker, and subject to the control and direction of Baker. Defendant Baker, from time to time, advanced to and reimbursed Simpson such sums as were required to pay the balance of the purchase price remaining due the State.

SIXTH.

Under the laws of the State of Washington, by virtue of the ownership of said Block 430 by said bank, the bank was entitled to the preference right to lease certain harbor area abutting, adjacent and appurtenant to said Block 430. After the assignment of said contract covering Block 430 of Seattle Tide Lands by Baker to Simpson, said Baker secretly, and for the purpose of defrauding said bank, its creditors, and stockholders, caused the State of Washington [6] to issue its certain harbor area lease No. 181 in the name of S. G. Simpson, who at that time held the record ownership of said Block 430, and the State of Washington did thereupon duly issue its harbor lease No. 181 to S. G. Simpson, covering the harbor area appurtenant, abutting and adjacent to said Block 430. Said Simpson had no interest in said lease, but held the

same at all times thereafter and until August, 1905, in trust for Baker, and subject to the control and direction of Baker.

SEVENTH.

Defendant Algernon S. Norton was during all the times mentioned in this complaint defendant Baker's lawyer and intimate personal friend, and a resident of the State of New York. On August 11, 1905, and while said Simpson held said lease and the assignment of said contract for the sole benefit of the defendant Baker, said Baker, upon removing his residence from Seattle to New York, and upon the fatal illness of Simpson, and his removal to San Francisco, directed and caused Simpson and wife to convey, and they did convey, said contract of purchase and said lease to said Algernon S. Norton. Said lands, and the contract and lease covering the same, were to Simpson's knowledge on said date reasonably worth the sum of One Hundred Thousand Dollars. The assignment of the contract and lease from Simpson and wife to said Norton was nevertheless made without consideration and for the sole use and benefit of the defendant Baker, and the moneys necessary to make payment to the State were paid by him, but whether from funds held by him as such receiver and belonging to the estate of said insolvent bank, or from his own funds, plaintiff is unable to determine. These sums were in all the relatively insignificant sums [7] contracted for, from the State in the year 1897. The assignment from defendant Baker, as receiver, to Simpson was an instrument which, under the established practice of the community and of the Land Department of the

State of Washington, should be recorded in the office of the Commissioner of Public Lands at Olympia, Washington, and in the office of the County Auditor of the county in which said lands are situated, and was required by law to be recorded in the latter office, and in the absence of such recording, such assignment was and is, under the laws of the State of Washington, void and ineffective as against purchasers or assignees in good faith. Said assignment was never so recorded, but was withheld from record by the defendant Baker for the purpose of concealing his own fraudulent acquisition of the said properties.

EIGHTH.

Thereafter, on October 16, 1905, upon payment by said defendant Baker to the State of Washington of all amounts due under said contract, the defendant Baker caused the State of Washington to issue to said Norton its deed in fee simple covering all of said Block 430 of Seattle Tide Lands, except the following:

A strip of land 30 feet wide across Lots 1 to 9, inclusive, being 8 feet on the northerly side and 22 feet on the southerly side of the main tract of the Seattle & San Francisco Railway & Navigation Company, as the same is now constructed, and which is described as follows:

Beginning at a point on the west side of Block 430, from which the northwest corner of said block bears north 228.654 feet distant; thence in a northeasterly direction to a point on the east side of said block, from which the northeast corner bears north 262.963 feet distant; containing .40757 acres.

NINTH.

Said Norton had no interest of any nature whatsoever in said premises or said lease, but confederating with the [8] defendant Baker held the title to the same at all times for the sole and exclusive use of the defendant Baker, and subject to his direction and control, and delivered to Baker a written declaration of such trust, which instrument was by defendant Baker withheld from record for the purpose of concealing his claim of ownership of said property.

TENTH.

In August, 1907, the defendant Baker caused the incorporation, under the laws of the State of Washington, of the defendant Seattle Water Front Realty Company. This corporation was formed for the sole purpose of receiving title to said tide lands in furtherance of a fraudulent plan of defendant Baker to appropriate to himself, conceal and convert the assets of said insolvent bank, and to defeat the rights of its creditors and stockholders. Employees in the office of defendant Norton acted as dummy incorporators, under the direction of defendant Baker, and all the corporate records have always been kept in New York under Baker's control. Said defendant corporation was organized by defendant Baker with a purported capital stock of Two Hundred Fifty Thousand Dollars (\$250,000.00), all of which stock was issued as fully paid and non-assessable in consideration of the transfer by Norton to it of the tide lands and the lease hereinbefore described. No other capital has gone into said corporation and no stock has been paid for except by the transfer of

said premises. The persons named as incorporators, trustees and officers of said company acted therein solely as agents and instruments of the defendant Baker and, as your orator is informed, believes, and charges the fact to be, no person except defendant Baker has now or has ever had any real interest in said company, either as stockholder or [9] otherwise, and said corporation is a sham designed by defendant Baker for the sole purpose of aiding him in the concealment and appropriation of the premises heretofore described in this bill, and in defrauding the creditors and stockholders of said insolvent bank. Upon the organization of the corporation its entire capital stock was at once issued in the name of defendant Norton, and all but five per cent thereof immediately transferred in blank to defendant Baker, who has ever since held the same, but, for the purpose of concealing his ownership thereof and his fraudulent claim to the property belonging to his former trust, defendant Baker has never taken any of said shares of stock in his own name, except one block of two hundred fifty shares, and the remainder are held for the benefit of defendant Baker as follows: 1975 shares in the name of defendant Norton, 250 shares in the name of Union Savings and Trust Company of Seattle, and twenty-five shares in the name of persons unknown. By direction of the defendant Baker the said Norton did, in the year 1907, convey to said Seattle Water Front Realty Company the lands and lease hereinbefore described, without actual consideration, but for the purported consideration of the issuance of the capital stock of said purported corporation.

ELEVENTH.

The tide lands and lease hereinbefore described are, and at all times have been, situated in the Western District of Washington, Northern Division. The shares of stock in defendant Seattle Water Front Realty Company are personal property and its location is where said corporation is incorporated and has its principal place of business, to wit, in Seattle, King County, Washington, in the Western District of Washington, Northern Division, and nowhere else, and such [10] has been the *locus* of the stock of said company at all times since its incorporation.

TWELFTH.

The facts herein alleged were wholly unknown to any of the creditors and stockholders of said bank, and to plaintiff and the Comptroller of the Currency until the year 1913, and were, until that time, concealed from them by the defendants, as above set forth, and were first discovered by the Comptroller of the Currency on or about the 1st day of February, 1913, and your orator has been directed by said Comptroller to commence and prosecute this suit. Plaintiff avers that he, as receiver of Merchants' National Bank of Seattle, Washington, is the owner of the tide lands and lease hereinbefore described; that no title thereto ever passed from defendant Baker as receiver of said insolvent bank to said Simpson, or from said Simpson to said Norton, and that by the conveyance of said premises by the State of Washington to said Norton the equitable title passed to the then acting and qualified receiver of said bank, and that any title acquired by Norton was held by him as trustee for the receiver of said Mer-

chants' National Bank, and is now held by Seattle Water Front Realty Company as trustee for plaintiff, and that defendants Baker and Seattle Water Front Realty Company did, at the time of the purported transfer of said premises to said corporation, know, and have at all times known all the facts hereinbefore stated in this bill of complaint, and knew that said premises belonged to the receiver of said bank and formed a part of the estate of said insolvent bank. [11]

All of which actions, doings and pretenses of said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of the plaintiff in the premises, in consideration whereof and forasmuch as the plaintiff is remediless in the premises at and by the strict rules of the common law and can only have full and adequate relief in a court of equity, where matters of this nature are properly commenceable and relievable.

And your orator prays that the defendants and each of them may be compelled to answer each and every allegation in this bill contained, as fully as if directly interrogated as to each, but not under oath, answers under oath being hereby expressly waived.

And your orator further prays that the defendants and each of them may be adjudged and decreed to hold said lands and lease, or such portion thereof as is now in their possession, or in possession of either of them, in trust for your orator, and to convey the same to your orator; and that said defendants may be restrained and enjoined from hereafter transferring said premises and lease, or any part thereof, to

any other person, and may be perpetually enjoined from setting up any claim of title to said land, or any part thereof, or in any manner intermeddling therewith, and your orator prays that it may be determined whether defendants, or either of them, have expended upon the property involved in this suit any funds other than the funds of the estate of Merchants' National Bank, and offers to pay to defendants any such funds which the Court may hold he should pay on receiving the relief herein sought, or as a condition of receiving such relief.

And your orator further prays that in case it shall be found upon the hearing of this cause that said premises [12] and lease, or any portion thereof, have been transferred so as to defeat the right, interest and title of plaintiff therein, that an accounting may be had, and that all stock in said corporation and all other considerations which defendant Baker may have received for or on account of the transfer of any interest in said premises may be declared to have been received, and to be held as trustee for the use and benefit of plaintiff herein, and the defendants and each of them be enjoined and restrained from selling or disposing of, or permitting the sale, transfer or disposal of, any stock in said defendant corporation until the final order of this Court, and in case said premises, or any part thereof, shall have been found to have been transferred so as to defeat the title of plaintiff thereto, that said defendants be required to pay, transfer and deliver to plaintiff all moneys, stocks, or other considerations which may have been received in consideration of such transfer, and that in such case plaintiff's equitable lien and

claim to said stock may be enforced, and that the incumbrance or cloud of defendants' claim thereto may be removed, and that an accounting may be taken under the direction of the Court for the loss occasioned by defendants' wrongful and fraudulent acts in relation to the premises and the breach of trust of defendant Baker; and for such other and further relief in the premises as the nature and circumstances of this case may require and to your Honors may seem meet. To the end that your orator may obtain the relief to which he is justly entitled in the premises, he now prays the Court to grant him due process by subpoena directed to the said Charles H. Baker, Algernon S. Norton, and Seattle Water Front Realty Company, a corporation, defendants hereinbefore named, requiring and commanding each of them to appear [13] herein and answer, but not under oath, the same being expressly waived, the several allegations in this bill contained.

DANIEL KELLEHER,
R. P. OLDHAM,
R. C. GROSSCUP,
Solicitors for Plaintiff.

United States of America,
Western District of Washington,
County of King,—ss.

Daniel Kelleher, being first duly sworn, on oath deposes and says:

I am one of the attorneys for the plaintiff in the above-entitled cause. I have read the foregoing bill of complaint and know the contents thereof. I have personal knowledge of the facts stated in this bill

and upon which relief is asked, and the same are true of my own knowledge, except as to the matters therein stated on information and belief, and as to these matters, I believe the same to be true.

DANIEL KELLEHER.

Subscribed and sworn to before me this 31st day of May, 1913.

[Seal]

W. R. C. COCKE,

Notary Public in and for the State of Washington,
Residing at Seattle. [14]

Exhibit "A" [to Second Amended Bill of Complaint]—Petition for Leave to Compromise or Sell Bad and Doubtful Assets.

*In the Circuit Court of the United States for the
District of Washington, Northern Division.*

No. 515.

In the Matter of the Receivership of THE
MERCHANTS' NATIONAL BANK OF
SEATTLE.

**Petition for Leave to Compromise or Sell Bad and
Doubtful Assets.**

The undersigned, your petitioner, respectfully
represents and shows:

I.

That the Merchants' National Bank of Seattle, Washington, now is, and at all of the times herein-after mentioned was, a corporation duly organized and existing under and by virtue of the National Bank Laws of the United States of America.

II.

That on about the 20th day of May, 1895, said

bank became insolvent and unable to pay its debts, and thereupon and on about the 19th day of June, 1895, your petitioner, Charles H. Baker, was by the Honorable James H. Eckles, Comptroller of the Currency of the United States, duly appointed receiver of the said bank, and thereupon duly filed his bond as such receiver and took the oath prescribed by law and entered upon the discharge of the duties of his said trust, and ever since has been, and now is the duly appointed, qualified and acting receiver of said Merchants' National Bank of Seattle.

III.

Your petitioner further represents and shows, that there is now in his hands as such receiver a large amount of assets of his said trust, consisting of bills receivable [15] overdrafts, stocks, bonds, securities, warrants and claims due upon the assessment levied upon the stockholders of said bank by order of the Comptroller of the Currency, together with other personal and chattel property and evidences of indebtedness, which your petitioner has, after exhausting all means of collection, been unable to realize upon, and which your petitioner is informed and believes are bad or doubtful assets.

IV.

Your petitioner further represents and shows that a considerable sum can be realized by compromising or compounding the same with the debtors, or by selling said assets at private sale, and your petitioner believes it to be for the best interests of his said trust, and all persons concerned therein, that said assets be so compromised and compounded, or sold at private sale as aforesaid.

V.

Your petitioner further represents and shows, that an examination of the affairs of said receivership has been made by a special bank examiner under the authority and direction of the Honorable James H. Eckels, Comptroller of the Currency, and that said Comptroller of the Currency has authorized and directed your petitioner to apply to this Honorable Court for an order authorizing and empowering your petitioner to compromise, compound, or sell at private sale all of the assets of his said trust for cash for such sum or sums as in his judgment is for the best interests of the creditors of his said trust.

Wherefore, your petitioner prays that this Honorable Court make an order authorizing and empowering him to compromise, compound, or sell at private sale all of the bad [16] and doubtful assets of the said Merchants' National Bank of Seattle, Washington, now in his hands as receiver as aforesaid, for cash for such sum or sums as in the judgment of your petitioner is for the best interests of his said trust and all persons concerned therein, and for such other and further order in the premises as to this Honorable Court may seem meet and proper.

Dated this 6th day of October, 1897.

CHARLES H. BAKER,

As Receiver of the Merchants' National Bank of
Seattle.

United States of America,
State of Washington,
County of King,—ss.

Charles H. Baker, being first duly sworn, on oath says: That he is the petitioner named in the fore-

going petition. That he has heard the same read, knows the contents thereof and believes the same to be true.

CHARLES H. BAKER.

Subscribed and sworn to before me this 6th day of October, 1897.

[Notarial Seal]

JOHN H. POWELL,

Notary Public in and for the State of Washington,
Residing at Seattle. [17]

**Exhibit "B" [Order Granting Petition for Leave to
Compromise or Sell Bad and Doubtful Assets].**

*In the Circuit Court of the United States for the
District of Washington, Northern Division.*

No. 515.

In the Matter of the Receivership of THE
MERCHANTS' NATIONAL BANK OF
SEATTLE.

Order.

At this time the above-entitled matter came on regularly to be heard upon the petition of Charles H. Baker, as receiver of said The Merchants' National Bank of Seattle, Washington, for leave to compromise, compound or sell at private sale, as in his judgment may be for the best interests of his said trust, all of the bad and doubtful assets of said bank, and the Court having heard the said petition, and being now fully advised in the premises, it is hereby

Ordered, adjudged and decreed that the receiver of the said Merchants' National Bank of Seattle, be, and he hereby is authorized and empowered to compromise, compound, or sell at private sale, all assets

of said insolvent bank which are in his judgment bad and doubtful, consisting of bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and other personal and chattel property and evidences of indebtedness; for cash, for such sum or sums as he, as such receiver, may be able to obtain, and as shall, in his judgment, be for the best interests of his said trust. And said receiver is hereby authorized and empowered to make all necessary and proper assignments of transfers, and to do any other act or thing which may be necessary to fully carry out [18] the conditions and purposes of this order.

Done in open court this 6th day of October, A. D. 1897.

C. H. HANFORD,
Judge.

Copy of within Second Amended Bill received and due service thereof acknowledged this 31st day of May, 1913.

CORWIN S. SHANK,
H. C. BELT,

Attorneys for Norton and Seattle W. F. R. Co.

[Endorsed]: Second Amended Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington. May 31, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [19]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MER-
CHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON, and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

**Answer of Charles H. Baker to Second Amended
Bill of Complaint.**

Now comes Charles H. Baker, a citizen and resi-
dent of the State of New York, and for answer to
the Second Amended Bill of Complaint says and
alleges:

I.

This defendant has no knowledge or information
sufficient on which to form a belief as to whether or
not the Comptroller of the Currency appointed John
W. Schofield, receiver of the Merchants' National
Bank, or as to whether the said Comptroller had
power or authority to make such an appointment,
or as to whether said Schofield is in fact such receiver,
or has authority to maintain this action. This de-
fendant therefore demands strict proof pertaining
to each and every allegation in the first paragraph
of the bill.

II.

This defendant denies that in April, 1899, or at any other time, he was compelled to resign the receivership of the Merchants' National Bank. This defendant denies that he has any [20] knowledge or information as to whether or not A. W. Frater in February, 1913, or at any other time resigned as receiver of said Merchants' National Bank, and denies that he has any knowledge or information sufficient on which to form a belief as to whether or not John W. Schofield was appointed, or ever has been appointed receiver, and as to said allegations this defendant demands strict proof.

III.

This defendant denies that the Merchants' National Bank at the time of the appointment of this defendant as receiver had any preference right, and denies that at the time of, and after his appointment as receiver, he had any preference right or any right to purchase from the State of Washington for and in behalf of said bank, Tide Land Block 430, or any tide lands, and denies that the preference right to purchase said block or any tide lands was of the value of Three Hundred Thousand (\$300,000) Dollars or any other sum. The right to assign the right to purchase said Tide Land Block was, under the law, limited in time and of merely nominal value, and this defendant realized out of the same, considering the nature and character of said right, more than its true value. Said claim was doubtful and speculative, and properly belonged to a class known as desperate, and said claim was so regarded by the Comptroller of the Currency, who understood the

full nature of the same.

IV.

This defendant denies that the preference right to purchase said tide land known as Block 430 was of substantial or any value, and denies that the said Comptroller had authority to authorize this defendant, as receiver, to purchase said tide land from the State of Washington, or to use or obligate the funds of his trust for that purpose. This defendant admits that he paid to the State of [21] Washington at the time of the issuance of the contract for the purchase of said block, one of ten equal installments of the purchase price thereof, and that the said amount was paid from the funds in his hands as receiver, and this defendant denies that he paid any further amount from said funds, and denies that he had any authority to use the funds of said bank for the purpose of paying for said block, and avers that he had no right to obligate his trust to future judgments; that thereafter, for the purpose of relieving himself from responsibility, he sold the contract between himself as receiver and the State of Washington, to Saul G. Simpson, and that Saul G. Simpson paid to him a sum of money therefor more than the amount he, as receiver, had taken out of the funds of said trust to pay the State of Washington, and that thereby said trust was fully reimbursed with a profit, and that said sale to Saul G. Simpson, and the circumstances under which said sale was made, and the reasons therefor were fully known to the Comptroller, and said Comptroller approved of the acceptance of the amount received from Saul G. Simpson as a full, complete and satis-

factory settlement of this defendant's relation to said transaction. This defendant denies that said contract or the law under which he was acting as receiver, or the Comptroller of the Currency, or any other authority would have enabled him or permitted him to use the funds of said trust to complete the contract with the State of Washington, and this defendant denies that he, as receiver, or in any other capacity, held the contract for the purchase of said Tide Land Block for his own use or benefit, after the sale to Saul G. Simpson, until after he purchased said block from Saul G. Simpson in the open market, which purchase was agreed upon in the spring of 1899 and finally consummated in 1905.

V.

This defendant admits that he assigned said contract [22] with the State of Washington for the purchase of said Tide Land Block 430 to Saul G. Simpson, but denies that said assignment was a purported assignment, or made in any capacity except in good faith for valuable consideration paid by said Saul G. Simpson, which consideration was turned in in full to the trust administered by this defendant. This defendant denies that he petitioned the Circuit Court of the United States for leave to sell certain property belonging to his trust for any purpose of concealment, but avers that his petition was made upon the advice of the Comptroller of the Currency, and by his direction, after due, thorough and complete examination of the assets of said trust made for and in behalf of said Comptroller by a duly appointed examiner, acting as the agent of said Comptroller. This defendant avers that his action in

making said petition and securing said order was in all respects in good faith and in pursuance of faithful administration of his trust, and in pursuance of the directions and control, and in pursuance of the advice of the Comptroller of the Currency, who had full knowledge of all the circumstances pertaining to said trust, and this defendant denies all inferences, innuendoes and allegations imputing to him in said transaction any purpose other than a full realization for and in behalf of said trust, of the value of the assets belonging thereto, including any contract said trust held relating to said tide lands. This defendant denies that he made use of Saul G. Simpson for the purpose or with the intent to defraud his trust of said Tide Land Block 430, or any other property, and denies that said Simpson became purchaser of said block in trust for this defendant, or for his use, or with the expectation that this defendant would acquire the ownership thereof, and denies that he had, while receiver, any agreement with said Simpson, secret or otherwise, by virtue of which this defendant was to become thereafter the owner of [23] said block, and that said Simpson held said block or the contract thereto, subject to a secret trust or any trust, and denies that under an agreement with said Saul G. Simpson, or at all, while receiver, this defendant was to have any interest in said contract or any of the lands described therein. This defendant denies that the sale of said contract to Simpson was made for the purpose of defrauding said insolvent bank or its creditors or stockholders, or that said Simpson, during the receivership of this defendant at any time held said property or said contract

for the use or benefit in any manner whatsoever, of this defendant. This defendant further denies that he from time to time, or at all, advanced to said Simpson or reimbursed said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block.

VI.

This defendant denies that said Merchants' National Bank, or that he, as receiver, was ever entitled to preference right to lease any harbor area adjacent to said Block 430, and denies that he, secretly or at all, or for any fraudulent purpose, caused the State of Washington to issue a lease to said harbor area designated as No. 181, or any lease in the name of Saul G. Simpson, but states that said Saul G. Simpson leased said harbor area from the State of Washington for his own personal use and on his own behalf. This defendant denies that said Simpson had no interest in said lease and denies that said Simpson held the same at any time in trust for this defendant or subject to his control or direction.

VII.

This defendant denies that said Simpson ever held said lease or the assignment of said contract for the benefit of this defendant, and denies that he directed or caused Simpson and wife to convey or assign said contract or lease to defendant A. S. [24] Norton on account of the illness of said Simpson, but avers that said Simpson and wife assigned said contract and said lease to this defendant for a valuable consideration in the usual course of business after this defendant's termination of connection with said trust, and that no such understanding existed prior

to about the month of March, 1899, and that said assignment was not made in pursuance of any understanding existing prior to that date. This defendant denies that at the time of the purchase of said contract and lease from said Simpson the said property was worth One Hundred Thousand (\$100,000) Dollars or any amount over and above the amount actually agreed to be paid for the same. This defendant denies that said contract and lease was assigned to the defendant Norton without consideration, but avers that said assignment was made for full and valuable consideration paid by this defendant to said Simpson from his own funds, and that the assignment was made to Norton at the instance and request of this defendant for the sole purpose of convenience. This defendant at the time was expecting to leave the United States for an indefinite period of time to engage in business in the Orient, and the contract was placed in the name of said Norton under an arrangement made between this defendant and Norton, so that Norton might be able in case of sale of said property to make good title to the same without delay. This defendant denies that said assignment was withheld from record for any purpose of concealment, but avers that following said assignment steps were immediately taken to secure the issuance of a deed from the State of Washington to the assignee Norton, and in the usual course of business said deed was issued to said Norton and placed on record.

VIII.

On or about October 16, 1905, the State of Washington [25] issued a deed covering said Tide Land

Block 430 to defendant Norton, excepting therefrom a strip about thirty (30) feet in width, and containing about four-tenths ($4/10$) of one acre covered by the right of way of the Seattle and San Francisco Railway and Navigation Company.

IX.

Said Norton, upon receiving the title to the said Tide Land Block 430 and said lease, executed and delivered to this defendant a declaration of trust showing that this defendant was the beneficial owner of said property, but said declaration was made without any purpose or intent to hide or conceal this defendant's connection with said property.

X.

The defendant corporation, Seattle Water Front Realty Company, was organized under the laws of the State of Washington, for the purpose of purchasing said Tide Land Block 430 and said lease, and for other purposes named in the Articles of Incorporation. This defendant denies that said corporation was formed in pursuance of fraudulent plan or any purpose of concealment or with any intent to convert the assets of the insolvent bank or to defeat the rights of any creditors or stockholders, and this defendant denies that the records of said corporation have been kept with any purpose of concealment or fraud, or for any purposes other than that of convenience. This defendant denies that no other capital has gone into said corporation, but avers that from time to time he and other stockholders have contributed to the maintenance of said property and to the payment of taxes thereon, and have in other ways incurred expenses in looking after said prop-

erty and preserving the same. This defendant denies that the persons named as incorporators, trustees and officers of said corporation have acted solely as the agents and [26] instruments of this defendant, but avers that all persons acting as officers and agents of said corporation have acted in behalf of said corporation, and this defendant denies that he is now or that he has at all times been the only person holding an interest in said company, but avers that other persons have held *bona fide* interests in said company by way of stock ownership, as is more fully set forth in the answer of the defendant Seattle Water Front Realty Company, the averments of which respecting stock ownership are hereby adopted and referred to by this defendant the same as if herein repeated, and this defendant denies that it has been the purpose of said corporation to in any way defraud, conceal from, or otherwise injure the creditors and stockholders of said insolvent bank, and this defendant avers that his interest in said corporation has at all times been open to all persons desiring knowledge concerning the same, and that as between himself and defendant Norton the said stock has stood on the books of said corporation in the name of Norton solely as a matter of convenience, but in truth and in fact this defendant has held the certificates for said stock, and has made no concealment of said holding.

XI.

This defendant admits that said property is located in the Western District of Washington and that the defendant corporation Seattle Water Front Realty Company is a corporation in the State of

Washington, having its principal place of business in Seattle.

XII.

Defendant denies that the purchase of said Tide Land Block 430 and said lease was made without the knowledge of the Comptroller of the Currency, and denies that the assignment of the same was made without the knowledge of the Comptroller of the [27] Currency, but avers that the Comptroller of the Currency had full knowledge of the situation both in law and fact relating to the claim of said insolvent bank to the right to purchase said land, and that all acts done and performed by this defendant pertaining to the same while this defendant remained receiver were with the full knowledge of said Comptroller and were done and performed with his approval. This defendant has no knowledge as to whether or not the complainant has been directed by the Comptroller to commence and prosecute this suit, but avers that this complainant had no right, either in law or fact, to commence this suit, and has no right to prosecute the same. This defendant denies that the complainant is the owner of said lands or lease described in the complaint. This defendant avers that complainant has no right or title to the said land or the said lease, either in law or equity, but avers that the sole title to the same is in the defendant Seattle Water Front Realty Company, and denies that said Seattle Water Front Realty Company holds said title as trustee or in any other manner except in fee simple, and for its own exclusive benefit and use, and this defendant denies that said Seattle Water Front Realty Company, its of-

ficers, agents and servants have ever had any knowledge of any claim or right adverse to its title. This defendant denies that he individually or as receiver has performed any act contrary to equity or good conscience, but avers that all of his acts while receiver were for the sole and exclusive benefit of his trust, and were performed in good faith and with the full knowledge of the officers of the United States having supervision of his trust.

This defendant avers that this suit is brought for the sole purpose of speculation since said land has become valuable; that up to the time of the final purchase of said land from the [28] State of Washington, said contract was a liability, and was without real value; that after S. G. Simpson had purchased the assignment of said contract he risked his own money in the purchase of said property from the State, and that at said time the Comptroller knew, and for a long time had known, that the said contract had been sold. The said trust realized by reason of the transactions of this defendant as receiver more than it could have otherwise realized, and all of the transactions of the defendant inured to the benefit of said trust, and not to its injury. The stockholders, creditors and others interested in said bank, and the officers having charge of said insolvent bank, having full knowledge of the facts relating to the transactions of this defendant as receiver, should be in equity estopped by their laches and by lapse of time from prosecuting this suit.

Wherefore this defendant asks that the title to said property be declared solely in the defendant Seattle Water Front Realty Company, and that a

decree be entered dismissing the bill and granting such affirmative relief as the defendants are entitled to in equity.

BENJAMIN S. GROSSCUP,
Attorney for Defendant Charles H. Baker.

Due service and copy of within Answer received this 15th day of July, 1913.

BAUSMAN & KELLEHER,
Attorneys for Plaintiff.

[Indorsed]: Answer of Charles Baker to Second Amended Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington. July 15, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [29]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MER-
CHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

**Answer of Defendant Algernon S. Norton to Second
Amended Bill of Complaint.**

Comes now the defendant Algernon S. Norton and for answer to the second amended bill of complaint herein alleges:

FIRST.

This defendant has no knowledge whether or not by order and appointment of the Comptroller of the Currency the plaintiff is the duly or otherwise appointed, qualified and acting receiver of the Merchants' National Bank of Seattle, Washington.

SECOND.

This defendant has no knowledge whether or not the Merchants' National Bank of Seattle is or was at any of the times herein mentioned a banking corporation organized or existing under any act of Congress and having its principal place of business in Seattle, or elsewhere. This defendant has no knowledge whether or not on May 15, 1895, the Comptroller of [30] the Currency became satisfied of the insolvency of said bank, but admits that on or about June 19, 1895, the defendant Charles H. Baker was appointed receiver of a bank then known as the Merchants' National Bank of Seattle, and that he entered upon the performance of his duties as such receiver, and took possession of all of the assets of said bank, and became and continued until April, 1899, the duly appointed, qualified and acting receiver of said bank, but this defendant avers that during all of said times the said Baker acted in his capacity as receiver in all matters connected with said receivership under the specific orders and directions of the Comptroller of the Currency. This defendant has no knowledge whether or not in April, 1899, the defendant Baker was compelled to resign, but admits that he did resign as receiver, and admits that thereupon A. W. Frater was appointed such receiver, but by whose authority and at whose instance this de-

fendant has no knowledge thereon. This defendant further has no knowledge whether or not on February 10, 1913, said Frater resigned as receiver, and whether or not on February 12, 1913, the plaintiff was by the Comptroller of the Currency or otherwise appointed receiver.

THIRD.

This defendant has no knowledge whether or not among the assets which came into the hands of the defendant Baker as receiver of said bank there were certain lands in King County, Washington, which had been the property of said bank up to the time of his appointment as receiver. This defendant denies that the bank and the defendant Baker as receiver, or either of them, had under the laws of the State of Washington a valuable preference right to purchase from the State of Washington [31] certain tide lands abutting upon any other lands, and particularly denies that such preference right extended to lands comprising approximately twelve acres of ground or any other amount of ground in the State of Washington, and particularly denies that such preference right extended to the purchase of the tract of land described and designated as block 430 of Seattle Tide Lands, but admits that said block 430 is at the present time of considerable value but denies that it is of the value of \$300,000.

FOURTH.

This defendant denies that on February 13, 1897, and at all times thereafter or at any other time the preference right to purchase said tide lands was of a substantial value or any value to the said receiver, but has no knowledge whether or not on said date

the Comptroller of the Currency authorized the defendant Baker as receiver to purchase said tide lands from the State of Washington, but avers that if such authorization and direction were given, the same were without authority in law. This defendant admits that said Baker purporting to act as such receiver did thereafter enter into negotiations with the State of Washington for the purchase of said tide lands, but denies that any lawful contract was ever made with the State that could be enforced against or in behalf of the said receivership, and denies that the defendant Baker paid the State of Washington all or several installments of the purchase price thereof from the funds of said estate in his hands as such receiver, but admits that he did pay to the State of Washington one installment thereof, and thereupon the State of Washington issued what purported to be a contract, but denies that the same was a contract of sale covering block 430 of Seattle Tide Lands, and this defendant has no knowledge as [32] to what the provisions of said purported contract were with reference to the issuance of a deed in fee simple to said tide lands, or as to the other provisions of the said purported contract, but avers that whatever the provisions thereof may have been they were not enforcible in behalf of or against the said estate and the receivership thereof. This defendant denies that said Baker, as receiver of said bank, held said purported contract or could hold the same as one of the assets of said insolvent bank, and avers that under the acts of Congress and the authority vested in said Baker that he had no right whatsoever to negotiate and receive such a contract.

FIFTH.

This defendant admits that after the issuance of said purported contract with the State, and while Baker was acting as receiver of the said bank, he conveyed and assigned said purported contract of purchase to Sol G. Simpson, but denies that this assignment was made without actual consideration, and avers that said assignment was made for a valuable consideration in excess of the amount which he, Baker, as receiver had invested in said contract, and that said assignment was made only after the Comptroller of the Currency had sent a special representative or inspector to Seattle to investigate the assets of the said bank, and after the said inspector had reported thereon to the Comptroller of the Currency recommending that all of the property and assets of the said bank be disposed of and the said estate closed, which said recommendation was approved by the Comptroller of the Currency, and orders issued accordingly. This defendant admits that the assignment was dated November 26, 1897, and was not executed and acknowledged until January 19, 1898, but avers that the delay of [33] about fifty days was occasioned purely and simply by the routine of administration.

This defendant admits that on October 6, 1897, the said Baker petitioned the Circuit Court of the United States for the District of Washington, but denies that such petition was for the purpose of concealing the assignment of said contract and to disguise its real nature, and denies that said petition was in vague and general terms, but admits that the petition was for leave to sell certain bad and doubtful bills re-

ceivable, overdrafts, stocks, bonds, securities, warrants and claims due upon the assessments levied upon the stockholders of said bank, but avers that said petition contained also a further provision that there were certain other personal and chattel property and evidence of indebtedness upon which the receiver was unable to realize anything, and that he likewise regarded them as doubtful, and further avers that said petition was full and explicit, and that he asked to sell the same at private sale, and that on the same date the Judge of said court made an order not only purporting but in fact authorizing and empowering the said Baker to compromise, compound or sell at private sale all the assets of said insolvent bank which were in his judgment as receiver bad and doubtful, embracing among other things bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and all other personal and chattel property and evidences of indebtedness, and that such order was to sell them for cash for such sum or sums as he as receiver might be able to obtain, and for such sum or sums as in his judgment as receiver would be for the best interests of said trust. This defendant has not compared the Exhibits "A" and "B" attached to said bill of complaint with the original, and therefore [34] has no knowledge as to whether they are exact copies thereof, but believes them to be, but requires proof thereof.

This defendant admits that during 1897, the defendant Baker was an intimate friend of Sol G. Simpson, but denies that he made use of Simpson

for the purpose of defrauding and with the intent of defrauding the said receivership of block 430 of Seattle Tide Lands, or of any other tide lands or property, or of defrauding or with intent to defraud any one whomsoever, but avers that the purchase made by Simpson was *bona fide* and for a valuable consideration and at a profit to the estate of a contract which the said Baker as receiver had no right or authority in law to acquire, hold and perfect, and this defendant denies that said Baker arranged with Simpson that he should become the purchaser from said receiver of the right to purchase blocks 431 and 430, or any property whatsoever, and denies that he had any secret agreement with Simpson that Simpson should hold said block 430 for the use and benefit of the defendant Baker as the real owner, or that he had any agreement with the said Simpson with reference thereto. This defendant denies that any prior arrangement was had with said Simpson or that any such arrangement was carried out. This defendant admits that Simpson took over from the defendant Baker both of said purported contracts for the purchase of blocks 430 and 429 of Seattle Tide Lands, and denies that Simpson took over such assignment of blocks 430 or 429 for the use and benefit of the defendant Baker, and denies that the same was subject to any secret or other trust, and denies that said Baker had any agreement with said Simpson that he, Simpson, should have no interest in block 430, but should upon demand transfer the same to the defendant Baker or his nominee, and denies absolutely any such arrangement, [35] secret or otherwise, or that said assignment to said Simpson

was other than *bona fide* for a valuable consideration and with the sole interest of the said receivership uppermost in his mind.

This defendant denies that the sale and assignment by Baker as receiver to Simpson was without a valid order of Court directing the same, and denies that the sale was without any authority from the Comptroller of the Currency regarding it, but, on the contrary, avers that said Baker was at all times acting under specific orders and directions from the Comptroller and with his advice regarding these specific matters. This defendant denies that said assignment to Simpson was made by Baker for Baker's own use, without the knowledge or consent of the Comptroller and for the purpose of secretly defrauding said insolvent bank, its creditors and stockholders, and denies that said Simpson during all of the time that he held the title to said property held the same in trust for said Baker and subject to the control and direction of Baker.

This defendant further denies that Baker from time to time advanced to said Simpson the sums that were paid by Simpson to the State of Washington, but avers that long after the said Baker ceased to act as receiver of said bank that he purchased from the said Simpson the said contract.

SIXTH.

This defendant denies that said bank by virtue of any ownership of any lands whatsoever or the said receiver by virtue of any rights which he lawfully had was entitled to the preference right to lease any harbor area abutting, adjacent [36] or appurtenant to said block 430. This defendant denies that

after the assignment of said purported contract covering block 430 of Seattle Tide Lands from Baker as receiver to Simpson, that said Baker secretly or otherwise, for the purpose of defrauding said bank, its creditors and stockholders, did in fact cause or procure the State of Washington to issue harbor area lease #181 in the name of Simpson, but admits that at the time said harbor area lease was issued said Simpson was not only the record owner but was in fact the owner of the contract covering block 430, and that the harbor area lease #181 was issued to said Simpson covering the harbor area appurtenant and adjacent to said block 430, but avers that the same was procured by said Simpson. This defendant denies that said Simpson had no interest in said lease, and denies that Simpson held the same after the issuance thereof and until August, 1905, or at all, in trust for Baker and subject to the control and direction of Baker.

SEVENTH.

This defendant admits that he was during all the times mentioned in this bill of complaint the defendant Baker's lawyer and intimate personal friend, and a resident of the State of New York. This defendant admits that on August 11, 1905, Simpson and wife conveyed said contract of purchase and said lease to him, and admits that said assignment was made for the sole benefit of the defendant Baker, but denies that the same was occasioned by any fatal illness of the said Simpson and his removal to San Francisco. This defendant avers that said assignment was made to him as a matter of convenient handling of the same because of the contemplated

absence from this country of the said Baker. This defendant [37] denies that the same was with any intent to secret or otherwise cover up any transaction whatsoever. This defendant has no knowledge as to whether Simpson knew the said property to be reasonably worth the sum of \$100,000 or what his knowledge upon that subject was. This defendant admits that the assignment of the contract and lease from Simpson and wife to him was without consideration and for the sole use and benefit of the defendant Baker, and that the moneys necessary to make the payments to the State of Washington, which were thereafter made, were advanced by Baker, but denies that the funds so used by Baker belonged to the said insolvent bank, and avers that such payments were made more than six years after the said Baker had resigned from such receivership, and avers that they were made from his own private funds. This defendant denies that the sums so paid were relatively insignificant, and avers that the sums paid were a fair and proper valuation of said property at the time the same were made.

This defendant admits that as against innocent purchasers or assignees in good faith, it would have been necessary to make a proper record of said assignment with the commissioner of public lands at Olympia, Washington, and with the county auditor of King County, Washington, but denies that there was any such necessity existing in this particular transaction, and avers that very shortly after the said assignment the balance of the payments due the State of Washington were made by said Baker and a deed issued for said land, which said deed was

properly recorded. This defendant further avers that all of said transaction was conducted in the ordinary and usual course of such purchases. This defendant denies that the failure to record said assignment was for the purpose of concealing the fraudulent acquisition of said properties or any fraudulent design whatsoever. [38]

EIGHTH.

This defendant admits that on October 16, 1905, upon payment by defendant Baker to the State of Washington of all amounts due under said contract the defendant Baker caused the State of Washington to issue to this defendant his deed in fee simple covering all of said block 430 of Seattle Tide Lands, excepting a strip of land thirty feet in width across certain portions thereof containing .40757 acres.

NINTH.

This defendant admits that he had no interest of any nature whatsoever in said premises or said lease at the time he took title thereto from said Simpson, and that thereafter and until on or about April 7, 1906, he held title to the same at all times for the sole and exclusive use of the defendant Baker and subject to his direction and control, and that he delivered to Baker a written declaration of trust, but denies that he confederated with the defendant Baker, or that the declaration of trust was withheld from record for the purpose of concealing Baker's claim of ownership in said property, and denies that any other act which he did was for any unlawful or immoral purpose.

This defendant avers that on April 7, 1906, he, being seized in fee simple of the legal title to block

430 of Seattle Tide Lands, and being possessed of the legal title to harbor area lease #181, which was also held in trust for the defendant Baker, purchased and acquired from the defendant Baker, and the defendant Baker granted and conveyed to him the beneficial interest in an undivided .02 part or share of said lands, together with an undivided .02 interest in said lease; the beneficial interest in a .01 part or share of said [39] land and lease was so conveyed in consideration of the sum of \$1000, for which sum he, on or about April 7, 1907, gave to the defendant Baker his promissory note which was thereafter and on or about January 28, 1909, paid, together with the accrued interest thereon; the beneficial interest in the other .01 part or share of said land and lease was so conveyed in consideration of services theretofore rendered and thereafter to be rendered by him in and about the holding and care and management of said tide lands, which services he has continued to render from time to time ever since. This defendant further avers that thereafter, and on or about October 3, 1906, he being seized in fee simple of the legal title to said land and lease as aforesaid purchased and acquired from the defendant Baker, and the defendant Baker granted and conveyed to him the beneficial interest in a further undivided .01 part or share of said land and lease in consideration of an assignment then made to the defendant Baker of an interest to the extent of \$2,000 in certain claims and causes of action against the city of New York. This defendant avers that he was a purchaser of all of said beneficial interest in the said land and lease in good faith for a

valuable consideration, and without any knowledge or notice whatever of any or either of the pretended fraudulent acts and conspiracies in the bill of complaint alleged, or of any rights or claims of the Merchants' National Bank of Seattle, or the receiver of said bank.

TENTH.

This defendant denies that in August, 1907, the defendant Baker caused the incorporation of the defendant Seattle Water Front Realty Company, and avers on the contrary that the said incorporation was caused in the month of April, 1907, [40] by the joint desire and action of himself and the defendant Baker. This defendant denies that said corporation was formed for the sole purpose of receiving title to said tide lands, or that it was formed in furtherance of a fraudulent plan of the defendant Baker to appropriate to himself, conceal or convert the assets of said insolvent bank, or to defeat the rights of its creditors or stockholders, or for any other fraudulent purpose whatsoever. This defendant denies that the employees in his office acted as dummy incorporators, or acted at all under the direction of the defendant Baker, and denies that all the corporate records have always been kept in New York under defendant Baker's control, but admits that they have been there most of the time. This defendant avers that the said corporation was actually formed by Mr. George F. Meacham and Mr. Albert H. Beebe of Seattle, Washington. This defendant admits that said corporation was organized with the purported capital of \$250,000, all of which was issued as fully paid and non-assessable, but this

defendant denies that all of said stock was issued in consideration of the transfer by him of the tide lands and lease mentioned in the bill of complaint, and avers that said stock was issued for the consideration hereinafter stated. This defendant denies that no capital other than said lands has gone into said corporation, and denies that no payment has been made to the corporation for any of its stock except by the transfer of the said premises, and this defendant avers that the facts in that regard are as herein stated. This defendant denies that the persons named as incorporators, trustees and officers of said company, or any of them, acted other than solely and as the agents and instruments of the defendant Baker, and avers that they acted on behalf of said corporation and of its stockholders. This [41] defendant denies that no person excepting the defendant Baker is now or ever has had any real interest in said company either as a stockholder, or otherwise. This defendant denies that said corporation is a sham designed by the defendant Baker for the purpose of aiding him in the concealment and appropriation of the premises described in said bill of complaint, or that it was designed to be used in defrauding the creditors and stockholders of said insolvent bank, or that it was organized for any other purpose than lawful and legitimate purposes.

This defendant admits that upon the organization of the corporation its entire capital stock was at once issued in his name, and all but 5% thereof immediately transferred in blank to defendant Baker, but denies that the defendant Baker has ever since held the same, and denies that he has held any thereof

for the purpose of concealing his ownership or any fraudulent claim to the property in the complaint mentioned, and denies that the defendant Baker has never taken any of said shares of stock in his own name excepting one block of 250 shares, and except as hereinafter specifically admitted this defendant denies that said stock is entirely held—1975 shares in his name, 250 shares in the name of Union Savings and Trust Company, and 25 shares in the name of unknown persons.

This defendant denies that by direction of the defendant Baker, he did in 1907 convey to said defendant Seattle Water Front Realty Company the land and lease hereinbefore described, but admits that such conveyance was in fact made but denies that the same was without actual consideration, but admits that the conveyance was in addition to other consideration in consideration of the issuance of the capital stock of said corporation, which constituted the chief consideration [42] for said conveyance.

This defendant avers that on or about April 26, 1907, four shares of the capital stock of said company were issued for a valuable consideration to George F. Meacham of Seattle, who is the owner and holder thereof; that on or about the same date one share of the capital stock of said corporation was issued for a valuable consideration to Albert H. Beebe of Seattle, Washington, who is the owner and holder thereof; that on or about the same date one share of the capital stock of said corporation was issued to Henry J. Sondheim of New York City, who on September 15, 1908, transferred the said share to

Percival H. Gregory, who is the holder thereof, the defendant Baker being the owner; that on or about the same date one share of the capital stock of said corporation was issued to Frank Cummings of Preble, New York, who is the holder thereof, the defendant Baker being the owner; that on or about the same date seventy-five shares of the capital stock of said corporation were issued to him, the said shares representing and being issued in consideration of his undivided interest in the said lands and lease hereinbefore mentioned, and he is now the owner and holder of said shares; that on or about the same date twenty-four hundred and eighteen shares of the capital stock of the said corporation were issued to him as the nominee of the defendant Baker, and he thereupon assigned and delivered the certificates for the said twenty-four hundred and eighteen shares to the defendant Baker, said shares representing and being issued in consideration for his undivided interest in said lands and lease hereinbefore mentioned. That on June 14, 1907, the defendant Baker transferred for a valuable consideration ten shares of the capital stock of said corporation to May L. Norton of Suffern, New York, who is the owner and holder thereof. That on the same date the defendant Baker transferred to this defendant twenty-five shares of the capital stock of [43] said corporation in consideration of legal services theretofore rendered by him to the defendant Baker, which services had theretofore been agreed upon between him and Baker as \$1250.00 and he is the owner and holder of said shares. That on July 25,

1907, the defendant Baker transferred two hundred and fifty shares of the capital stock of said corporation for a valuable consideration to the Union Savings & Trust Company of Seattle, Washington, which is now the owner and holder of said shares. That on January 17, 1908, the defendant Baker transferred five shares of the capital stock of said corporation to Clay Harding of the city of New York, said transfer being for a valuable consideration, and said Harding is now the owner and holder of said shares. That on January 17, 1908, the defendant Baker transferred for a valuable consideration five shares of the capital stock of said corporation to Louisa Buchanan of Tulalip, Washington, who is the owner and holder of said shares. That on February 4, 1908, the defendant Baker transferred for a valuable consideration five shares of the capital stock of said corporation to Irene Hoffman of New Albany, Indiana, who is the owner and holder of said shares. That on February 4, 1908, the defendant Baker for a valuable consideration transferred five shares of the capital stock of said corporation to Pauline Hoffman of New Albany, Indiana, who is the owner and holder of said shares. That on December 22, 1909, for a valuable consideration the defendant Baker transferred twenty-four shares of the capital stock of said corporation to Irene Russell Washburn of Nashville, Tennessee, who is now the owner and holder of said shares. That on July 29, 1910, the defendant Baker transferred to this defendant twenty-five shares of the capital stock of said corporation in consideration of legal services theretofore

rendered, which services had been agreed upon by the defendant Baker and himself as \$1250, and he is now the owner and holder of said shares. That on [44] October 2, 1911, for a valuable consideration he transferred five shares of the capital stock of said corporation to Charles L. Downs of the city of New York, who is now the owner and holder of said shares.

ELEVENTH.

This defendant admits that the tide lands and lease hereinbefore described are and at all times have been situated in the Western District of Washington, and also admits that the shares of stock in said defendant Seattle Water Front Realty Company are personal property and its location is where said corporation is incorporated and has its principal place of business, which is in Seattle, Washington, and nowhere else, and such has been the *locus* of the stock of said company at all times since the incorporation of said Seattle Water Front Realty Company.

TWELFTH.

This defendant denies that the alleged facts set forth in the said bill were wholly unknown to any of the creditors and stockholders of the said bank, and to the plaintiff and to the comptroller of the currency until the year 1913, and denies that they were until that time concealed from them by the defendants as in said bill set forth, or otherwise, and denies that the proceedings in said receivership and the acts and doings of the said Baker as receiver were first discovered by the comptroller of the currency on or

about February 1, 1913.

This defendant has no knowledge whether or not the plaintiff has been directed by the comptroller of the currency to commence and prosecute this suit.

This defendant avers that all facts in said bill of complaint set forth, and all matters connected with said receivership, [45] and all dealings with reference to the said block 430 of Seattle Tide Lands and of the harbor area lease adjacent thereto and the method of handling the same, were matters known to the Comptroller of the Currency and were conducted under and pursuant to his advice and direction; in addition to which the same were matters of public record open to the world, and the same state of facts which now exist and form the basis of the allegations of said bill of complaint have existed at all times since the Merchants' National Bank of Seattle was placed in the hands of a receiver, and could and would have been discovered and made known to anyone investigating the same, or investigating or inquiring into the doings and affairs of said receivership. This defendant further avers that by reason of these facts the plaintiff is guilty of laches and is also estopped from setting up or asserting said allegations as a lawful basis for an action at law or in equity against the defendants, or either of them, or against the various stockholders of the Seattle Water Front Realty Company.

This defendant denies that the plaintiff, as receiver of the Merchants' National Bank of Seattle, is the owner of the tide lands and lease in said bill of complaint described. This defendant denies that

no title thereto has passed from the defendant Baker as receiver of said insolvent bank to said Simpson, or from said Simpson to this defendant, and further denies that by the conveyance of the said premises by the State of Washington to this defendant the equitable title, or any title, passed to the then acting receiver of said bank, and denies that the title acquired by him was held by him as trustee for the receiver of the Merchants' National Bank of Seattle, and denies that it is now held by the Seattle Water Front Realty Company as trustee for the plaintiff, or for any other person whomsoever other than the stockholders of said company, and denies [46] that the defendant Baker and the Seattle Water Front Realty Company have known of any state of facts whether those alleged in the said bill of complaint, or otherwise, that said premises belong to the receiver of said bank and form a part of the estate of said insolvent bank.

This defendant denies that the actions, doings and pretenses of this defendant, or of either of the defendants, are contrary to equity and good conscience, and tend to wrong, injure or oppress the plaintiff or any other person whomsoever.

WHEREFORE this defendant prays that the bill of complaint be dismissed and that he go hence with his costs and disbursements.

CORWIN S. SHANK,
HORATIO C. BELT,

Attorneys for Defendant Algernon S. Norton.

Service of the within Answer of Algernon S. Norton is hereby admitted this 15th day of July, 1913.

DAN'L KELLEHER,

R. P. OLDHAM,

R. C. GOODALE,

Attorneys for Plaintiff.

[Indorsed]: Answer of Defendant Algernon S. Norton to Second Amended Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington. July 16, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [47]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN EQUITY—No. 1.

JOHN A. SCHOFIELD, as Receiver of MER-
CHANTS' NATIONAL BANK OF SEAT-
TLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NORTON
and SEATTLE WATER FRONT REALTY
COMPANY, a Corporation,

Defendants.

**Amended Answer of Defendant Seattle Water Front
Realty Company, a Corporation, to Second
Amended Bill of Complaint.**

Comes now the defendant Seattle Water Front Realty Company, a corporation, and for answer to the second amended bill of complaint herein alleges:

FIRST.

This defendant has no knowledge whether or not by order or appointment of the Comptroller of the Currency the plaintiff is the duly or otherwise appointed, qualified or acting receiver of the Merchants' National Bank of Seattle, Washington.

SECOND.

This defendant has no knowledge whether or not the Merchants' National Bank of Seattle is or was at any time herein mentioned a banking corporation organized or existing under any act of Congress or having its principal place of business in Seattle, or elsewhere. This defendant has no knowledge whether or not on May 15, 1895, the Comptroller of [48] the Currency became satisfied of the insolvency of said bank, but admits that on or about June 19, 1895, the defendant Charles H. Baker was appointed receiver of a bank then known as the Merchants' National Bank of Seattle, and that he entered upon the performance of his duties as such receiver, and took possession of all of the assets of said bank, and became and continued until April, 1899, the duly appointed, qualified and acting receiver of said bank, but this defendant avers that during all of said times the said Baker acted in his capacity as receiver in all matters connected with said receivership under the specific orders and directions of the Comptroller of the Currency and the United States Circuit Court. This defendant has no knowledge whether or not in April, 1899, the defendant Baker was compelled to resign, but admits that he did resign as receiver, and admits that there-

upon A. W. Frater was appointed such receiver, but by whose authority or at whose instance this defendant has no knowledge thereon. This defendant further has no knowledge whether or not on February 10, 1913, said Frater resigned as receiver, or whether or not on February 12, 1913, the plaintiff was by the Comptroller of the Currency or otherwise appointed receiver.

THIRD.

This defendant has no knowledge whether or not among the assets which came into the hands of the defendant Baker as receiver of said bank there were certain lands in King County, Washington, which had been the property of said bank up to the time of his appointment as receiver. This defendant denies that the bank or the defendant Baker as receiver, or either of them, had under the laws of the State of Washington a valuable preference right to purchase from the State of Washington [49] certain tide lands abutting upon any other lands, and particularly denies that such preference right extended to lands comprising approximately twelve acres of ground or any other amount of ground in the State of Washington, and particularly denies that such preference right extended to the purchase of the tract of land described and designated as block 430 of Seattle Tide Lands, but admits that said block 430 is at the present time of considerable value but denies that it is of the value of \$300,000.

FOURTH.

This defendant denies that on February 13, 1897, or at any time thereafter the preference right to

purchase said tide lands was of a substantial value or any value to the said receiver, but has no knowledge whether or not on said date the Comptroller of the Currency authorized the defendant Baker as receiver to purchase said tide lands from the State of Washington, but avers that if such authorization or direction were given, the same were without authority of law. This defendant admits that said Baker purporting to act as such receiver did thereafter enter into negotiations with the State of Washington for the purchase of said tide lands, but denies that any lawful contract was ever made with the State that could be enforced against or in behalf of the said receivership, and denies that the defendant Baker paid the State of Washington all or several installments of the purchase price thereof from the funds of said estate in his hands as such receiver, but admits that he did pay to the State of Washington one installment thereof, and thereupon the State of Washington issued what purported to be a contract, but denies that the same was a contract of sale covering block 430 of Seattle Tide Lands, and this defendant has no knowledge as to what the provisions of said purported contract [50] were with reference to the issuance of a deed in fee simple to said tide lands, or as to the other provisions of the said purported contract, and avers that whatever the provisions thereof may have been they were not enforceable in behalf of or against the said estate or the receivership thereof. This defendant denies that said Baker, as receiver of said bank, held said purported contract or could hold the same as one

of the assets of said insolvent bank, but avers that under the acts of Congress and the authority vested in said Baker that he had no right whatsoever to negotiate and receive such a contract.

FIFTH.

This defendant admits that after the issuance of said purported contract with the State, and while Baker was acting as receiver of the said bank, he conveyed and assigned said purported contract of purchase to Sol G. Simpson, but denies that this assignment was made without actual consideration, and avers that said assignment was made for a valuable consideration in excess of the amount which he, Baker, as receiver had invested in said contract, and that said assignment was made only after the Comptroller of the Currency had sent a special representative or inspector to Seattle to investigate the assets of the said bank, and after the said inspector had reported thereon to the Comptroller of the Currency recommending that all of the property and assets of the said bank be disposed of and the said estate closed, which said recommendation was approved by the Comptroller of the Currency, and orders issued accordingly. This defendant admits that the assignment was dated November 26, 1897, and was not executed and acknowledged until January 19, 1898, but avers that the delay of about fifty days was occasioned purely and simply by the routine of administration. [51]

This defendant admits that on October 6, 1897, the said Baker petitioned the Circuit Court of the United States for the District of Washington, but

denies that such petition was for the purpose of concealing the assignment of said contract or to disguise its real nature, and denies that said petition was in vague or general terms, but admits that the petition was for leave to sell certain bad and doubtful bills receivable, overdrafts, stocks, bonds, securities, warrants and claims due upon the assessments levied upon the stockholders of said bank, but avers that said petition contained also a further provision that there were certain other personal and chattel property and evidences of indebtedness upon which the receiver was unable to realize anything, and that he likewise regarded them as doubtful, and further avers that said petition was full and explicit, and that he asked to sell the same at private sale, and that on the same date the Judge of said court made an order not only purporting but in fact authorizing and empowering the said Baker to compromise, compound or sell at private sale all the assets of said insolvent bank which were in his judgment as receiver bad and doubtful, embracing among other things bills receivable, judgments, overdrafts, stocks, bonds, warrants, securities, assessments upon the stockholders of said bank and all other personal and chattel property and evidences of indebtedness, and that such order was to sell them for cash for such sum or sums as he as receiver might be able to obtain, and for such sum or sums as in his judgment as receiver would be for the best interests of said trust. This defendant has not compared the Exhibits "A" and "B" attached to said bill of complaint with the original and therefore has no knowledge as to whether they are exact copies thereof, but believes

them to be, but requires proof thereof. [52]

This defendant admits that during 1897, the defendant Baker was an intimate friend of Sol. G. Simpson, but denies that he made use of Simpson for the purpose of defrauding, or with the intent of defrauding, the said receivership of block 430 of Seattle Tide Lands, or of any other tide lands or property, or of defrauding, or with intent to defraud, anyone whomsoever, but avers that the purchase made by Simpson was *bona fide* and for a valuable consideration and at a profit to the estate of a contract which the said Baker, as receiver, has no right or authority in law to acquire, hold and perfect, and this defendant denies that said Baker arranged with Simpson that he should become the purchaser from said receiver of the right to purchase blocks 429 and 430, or any property whatsoever, and denies that he had any secret agreement with Simpson that Simpson should hold said block 430 for the use or benefit of the defendant Baker as the real owner, or that he had any agreement with the said Simpson with reference thereto. This defendant denies that any prior arrangement was had with said Simpson or that any such arrangement was carried out. This defendant admits that Simpson took over from the defendant Baker both of said purported contracts for the purchase of blocks 430 and 429 of Seattle Tide Lands, and denies that Simpson took over such assignment of blocks 430 or 429 for the use or benefit of the defendant Baker, and denies that the same was subject to any secret or other trust, and denies that Baker had any agreement with said Simpson that he, Simpson, should have no interest in block

430, but should upon demand transfer the same to the defendant Baker or his nominee, and denies absolutely any such arrangement, secret or otherwise, or that said assignment to said Simpson was other than *bona fide* for a valuable consideration and with [53] the sole interest of the said receivership uppermost in his mind.

This defendant denies that the sale and assignment by Baker, as receiver, to Simpson was without a valid order of Court directing the same, and denies that the sale was without any authority from the Comptroller of the Currency regarding it, but, on the contrary, avers that said Baker was at all times acting under specific orders and directions from the Comptroller and with his advice regarding these specific matters. This defendant denies that said assignment to Simpson was made by Baker for Baker's own use without the knowledge or consent of the Comptroller and for the purpose of secretly defrauding said insolvent bank, its creditors and stockholders, and denies that said Simpson during all of the time that he held the title to said property held the same in trust for said Baker and subject to the control and direction of Baker.

This defendant further denies that said Baker from time to time advanced to said Simpson the sums that were paid by Simpson to the State of Washington, but avers that long after the said Baker ceased to act as receiver of said bank that he purchased from the said Simpson the said contract.

SIXTH.

This defendant denies that said bank by virtue of any ownership of any lands whatsoever, or the

said receiver by virtue of any rights which he lawfully had was entitled to the preference right to lease any harbor area abutting, adjacent or appurtenant to said block 430. This defendant denies that after the assignment of said purported contract covering block 430 of Seattle Tide Lands from Baker as receiver to Simpson, that said Baker secretly or otherwise for the purpose of defrauding said bank, its creditors and stockholders, [54] did in fact cause or procure the State of Washington to issue harbor area lease #181 in the name of Simpson, but admits that at the time the said harbor area lease was issued said Simpson was not only the record owner but was in fact the owner of the contract covering block 430, and that the harbor area lease #181 was issued to said Simpson covering the harbor area appurtenant and adjacent to said block 430, but avers that the same was procured by said Simpson. This defendant denies that said Simpson had no interest in said lease, and denies that Simpson held the same after the issuance thereof and until August 1905, or at all, in trust for Baker and subject to the control and direction of Baker.

SEVENTH.

This defendant admits that Algernon S. Norton was during all the times mentioned in this bill of complaint the defendant Baker's lawyer and intimate personal friend, and a resident of the State of New York. This defendant admits that on August 11, 1905, Simpson and wife conveyed said contract of purchase and said lease to Norton, and admits that said assignment was made for the sole benefit of the defendant Baker, but denies that the same was

occasioned by any fatal illness of the said Simpson and his removal to San Francisco. This defendant avers that said assignment was made to said Norton as a matter of convenient handling of the same because of the contemplated absence from this country of the said Baker. This defendant denies that the same was with any intent to secrete or otherwise cover up any transaction whatsoever. This defendant has no knowledge as to whether Simpson knew the said property to be reasonably worth the sum of \$100,000, or what his knowledge upon that subject was. This defendant denies that the assignment of the contract and lease from Simpson and wife to Norton [55] was without consideration, but admits that it was for the sole use and benefit of the defendant Baker, and that the moneys necessary to make the payments to the State of Washington, which were thereafter made, were advanced by Baker, but denies that the funds so used by Baker belonged to the said insolvent bank, and avers that such payments were made more than six years after the said Baker had resigned from such receivership, and avers that they were made from his own private funds. This defendant denies that the sums so paid were relatively insignificant, and avers that the sums paid were a fair and proper valuation of said property at the time the same were made.

This defendant admits that as against innocent purchasers or assignees in good faith, it would have been necessary to make a proper record of said assignment with the commissioner of public lands at Olympia, Washington, and with the county auditor of King County, Washington, but denies that there

was any such necessity existing in this particular transaction, and avers that very shortly after the said assignment the balance of the payments due the State of Washington were made by said Baker and a deed issued for said land, which said deed was properly recorded. This defendant further avers that all of said transaction was conducted in the ordinary and usual course of such purchases. This defendant denies that the failure to record said assignment was for the purpose of concealing the fraudulent acquisition of said properties or any fraudulent design whatsoever.

EIGHTH.

This defendant admits that on October 16, 1905, upon payment by defendant Baker to the State of Washington of all amounts due under said contract, the defendant Baker caused the State of Washington to issue to said Norton its deed in [56] fee simple covering all of said block 430 of Seattle Tide Lands, excepting a strip of land thirty feet in width across certain portions thereof containing .40757 acres.

NINTH.

This defendant admits that said Norton had no interest of any nature whatsoever in said premises or said lease at the time he took title thereto from said Simpson, and that thereafter and until on or about April 7, 1906, he held title to the same at all times for the sole and exclusive use of the defendant Baker and subject to his direction and control, and that he delivered to Baker a written declaration of trust, but denies that he confederated with the defendant Baker, or that the declaration of trust was

withheld from record for the purpose of concealing Baker's claim of ownership in said property, and denies that any other act which he did was for any unlawful or immoral purpose.

This defendant avers that on April 7, 1906, the defendant Norton being seized in fee simple of the legal title to block 430 of Seattle Tide Lands, and being possessed of the legal title to harbor area lease #181, which was also held in trust for the defendant Baker, purchased and acquired from the defendant Baker, and the defendant Baker granted and conveyed to the defendant Norton the beneficial interest in an undivided .02 part or share of said lands, together with an undivided .02 interest in said lease; the beneficial interest in a .01 part or share of said land and lease was so conveyed in consideration of the sum of \$1,000.00, for which sum the defendant Norton on or about April 7, 1906, gave to the defendant Baker his promissory note which was thereafter and on or about January 28, 1909, paid, together with the accrued interest thereon; the beneficial interest in the other .01 part or share [57] of said land and lease was so conveyed in consideration of services theretofore rendered and thereafter to be rendered by the defendant Norton in and about the holding and care and management of said tide lands, which services the defendant Norton has continued to render from time to time ever since. This defendant further avers that thereafter and on or about October 3, 1906, the defendant Norton being seized in fee simple of the legal title to said land and lease as aforesaid purchased and acquired from the defendant Baker, and the defendant Baker

granted and conveyed to the defendant Norton the beneficial interest in a further undivided .01 part or share of said land and lease in consideration of an assignment then made to the defendant Baker of an interest to the extent of \$2,000 in certain claims and causes of action against the city of New York. This defendant avers that the defendant Norton was a purchaser of all of said beneficial interest in the said land and lease in good faith for a valuable consideration, and without any knowledge or notice whatever of any or either of the pretended fraudulent acts and conspiracies in the bill of complaint alleged, or of any rights or claims of the Merchants' National Bank of Seattle, or the receiver of said bank.

TENTH.

This defendant denies that in August, 1907, the defendant Baker caused the incorporation of the defendant Seattle Water Front Realty Company, and avers, on the contrary, that the said incorporation was caused in the month of April, 1907, by the joint desire and action of the defendant Norton and the defendant Baker. This defendant denies that said corporation was formed for the sole purpose of receiving title to said tide lands, or that it was formed in furtherance of a fraudulent plan of the defendant Baker to appropriate to himself, [58] conceal or convert the assets of said insolvent bank, or to defeat the rights of its creditors or stockholders, or for any other fraudulent purpose whatsoever. This defendant denies that the employees in the office of the defendant Norton acted as dummy incorporators, or acted at all under the direction of the defendant Baker, and denies that all the corporate records have

always been kept in New York under the defendant Baker's control, but admits that they have been there most of the time. This defendant avers that the said corporation was actually formed by Mr. George F. Meacham and Mr. Albert H. Beebe of Seattle, Washington. This defendant admits that said corporation was organized with the purported capital of \$250,000, all of which was issued as fully paid and non-assessable, but this defendant denies that all of said stock was issued in consideration of the transfer by the defendant Norton to it of the tide lands and lease mentioned in the bill of complaint, and avers that said stock was issued for the consideration hereinafter stated. This defendant denies that no capital other than said lands has gone into said corporation, and denies that no payment has been made to the corporation for any of its stock except by the transfer of the said premises, and this defendant avers that the facts in that regard are as herein stated. This defendant denies that the persons named as incorporators, trustees, and officers of said company, or any of them, acted solely as the agents and instruments of the defendant Baker, and avers that they acted on behalf of said corporation and of its stockholders. This defendant denies that no person excepting the defendant Baker is now or ever has had any real interest in said company either as a stockholder or otherwise. This defendant denies that said corporation is a sham designed by the defendant Baker for the purpose of aiding him [59] in the concealment and appropriation of the premises described in said bill of complaint, or that it was designed to be used in defrauding the creditors and

stockholders of said insolvent bank, or that it was organized for any other purpose than lawful and legitimate purposes.

This defendant admits that upon the organization of the corporation its entire capital stock was at once issued in the name of the defendant Norton, and all but 5% thereof immediately transferred in blank to defendant Baker, but denies that the defendant Baker has ever since held the same, and denies that he has held any thereof for the purpose of concealing his ownership or any fraudulent claim to the property in the complaint mentioned, and denies that the defendant Baker has never taken any of said shares of stock in his own name except one block of 250 shares, and except as hereinafter specifically admitted this defendant denies that said stock is entirely held—1975 shares in the name of Norton, 250 shares in the name of Union Savings & Trust Company, and 25 shares in the name of unknown persons.

This defendant admits that such conveyance was made by Norton to the Seattle Water Front Realty Company, but denies that the same was by direction of the said Baker, and also denies that the same was without actual consideration, but alleges that the same was for a full and adequate consideration but admits that a part of the said consideration was the issuance of the capital stock of the said corporation.

This defendant avers that on or about April 26, 1907, four shares of the capital stock of said company were issued for a valuable consideration to George F. Meacham of Seattle, who is the owner and holder thereof; that on or about the same date one share of the capital stock of said corporation [60]

was issued for a valuable consideration to Albert H. Beebe of Seattle, Washington, who is the owner and holder thereof; that on or about the same date one share of the capital stock of said corporation was issued to Harry J. Sondheim of New York City, who on September 15, 1908, transferred the said share to Percival H. Gregory, who is the holder thereof the defendant Baker being the owner; that on or about the same date one share of the capital stock of said corporation was issued to Frank Cummings of Preble, New York, who is the holder thereof the defendant Baker being the owner; that on or about the same date seventy-five shares of the capital stock of said corporation were issued to the defendant Norton, the said shares representing and being issued in consideration of his undivided interest in the said lands and lease hereinbefore mentioned, the said Norton being now the owner and holder of said shares; that on or about the same date twenty-four hundred and eighteen shares of the capital stock of said corporation were issued to the defendant Norton, as the nominee of the defendant Baker, and the defendant Norton thereupon assigned and delivered the certificate for the said twenty-four hundred and eighteen shares to the defendant Baker, said shares representing and being issued in consideration for his undivided interest in said lands and lease hereinbefore mentioned. That on June 14, 1907, the defendant Baker transferred for a valuable consideration ten shares of the capital stock of said corporation to May L. Norton of Suffern, New York, who is the owner and holder thereof. That on the same date the defendant Baker transferred to the defend-

ant Norton twenty-five shares of the capital stock of said corporation in consideration of legal services theretofore rendered by the defendant Norton to the defendant Baker, which services had theretofore been agreed [61] upon between the defendant Norton and Baker as \$1,250.00, and the said defendant Norton is the owner and holder of said shares. That on July 25, 1907, the defendant Baker transferred two hundred and fifty shares of the capital stock of said corporation for a valuable consideration to the Union Savings & Trust Company of Seattle, Washington, which is now the owner and holder of said shares. That on January 17, 1908, the defendant Baker transferred five shares of the capital stock of said corporation to Clay Hardin of the city of New York, said transfer being for a valuable consideration, and said Hardin is now the owner and holder of said shares. That on January 17, 1908, the defendant Baker transferred for a valuable consideration five shares of the capital stock of said corporation to Louisa Buchanan of Tulalip, Washington, who is the owner and holder of said shares. That on February 4, 1908, the defendant Baker transferred for a valuable consideration five shares of the capital stock of said corporation to Irene Hoffman of New Albany, Indiana, who is the owner and holder of said shares. That on February 4, 1908, the defendant Baker for a valuable consideration transferred five shares of the capital stock of said corporation to Pauline Hoffman of New Albany, Indiana, who is the owner and holder of said shares. That on December 22, 1909, for a valuable consideration the defendant Baker transferred twenty-four

shares of the capital stock of said corporation to Irene Russell Washburn of Nashville, Tennessee, who is now the owner and holder of said shares. That on July 29, 1910, the defendant Baker transferred to the defendant Norton twenty-five shares of the capital stock of said corporation in consideration of legal services theretofore rendered, which services had been agreed upon by the defendant Baker and Norton as [62] \$1250, and the defendant Norton is now the owner and holder of said shares. That on October 2, 1911, the defendant Norton for a valuable consideration transferred five shares of the capital stock of said corporation to Charles L. Downs of the city of New York, who is now the owner and holder of said shares.

ELEVENTH.

This defendant admits that the tide lands and lease hereinbefore described are and at all times have been situated in the Western District of Washington, and also admits that the shares of stock in said defendant Seattle Water Front Realty Company are personal property and its location is where said corporation is incorporated and has its principal place of business, which is in Seattle, Washington, and nowhere else, and such has been the *locus* of the stock of said company at all times since the incorporation of said Seattle Water Front Realty Company.

TWELFTH.

This defendant denies that the alleged facts set forth in the said bill were wholly unknown to any of the creditors or stockholders of the said bank, or to the plaintiff, or to the Comptroller of the Currency

until the year 1913; and denies that they were until that time concealed from them by the defendants as in said bill set forth, or otherwise, and denies that the proceedings in said receivership and the acts and doings of the said Baker as receiver were first discovered by the Comptroller of the Currency on or about February 1, 1913, but avers that the plaintiff or his predecessors in interest knew or had means of knowing for more than three years prior to the commencement of this action, to wit, since January 1897, all facts known to him now, and that the plaintiff is, therefore [63] barred by the statute of limitations.

This defendant has no knowledge whether or not the plaintiff has been directed by the Comptroller of the Currency to commence and prosecute this suit.

This defendant avers that all facts in said bill of complaint set forth, and all matters connected with said receivership, and all dealings with reference to the said block 430 of Seattle Tide Lands and of the harbor area lease adjacent thereto and the method of handling the same, were matters known to the Comptroller of the Currency and were conducted under and pursuant to his advice and direction; in addition to which the same were matters of public record open to the world, and the same state of facts which now exist and form the basis of the allegations in said bill of complaint have existed at all times since the Merchants' National Bank of Seattle was placed in the hands of a receiver, and could and would have been discovered and made known to anyone investigating the same, or investigating or inquiring into the doings of affairs of said receivership.

This defendant further avers that by reason of these facts, the plaintiff is guilty of laches and is also estopped from setting up or asserting said allegations as a lawful basis for an action at law or in equity against the defendants, or either of them, or against the various stockholders of the Seattle Water Front Realty Company.

This defendant denies that the plaintiff, as receiver of the Merchants' National Bank of Seattle, is the owner of the tide lands and lease in said bill of complaint described. This defendant denies that no title thereto has passed from the defendant Baker as receiver of said insolvent bank to said Simpson, or from said Simpson to said Norton, and further denies that by the conveyance of the said premises by the State of [64] Washington to the said Norton the equitable title, or any title, passed to the then acting receiver of said bank, and denies that the title acquired by Norton was held by him as trustee for the receiver of the Merchants' National Bank of Seattle, and denies that it is now held by the Seattle Water Front Realty Company as trustee for the plaintiff, or for any other person whomsoever other than the stockholders of said company, and denies that the defendant Baker and the Seattle Water Front Realty Company have known of any state of facts whether those alleged in the said bill of complaint, or otherwise, that said premises belong to the receiver of said bank and form a part of the estate of said insolvent bank.

This defendant avers that for a period of more than seven successive years prior to the commencement of this action it together with its predecessors

in interest have in good faith paid all taxes legally assessed against the above property, and it is still paying said taxes, and that by reason thereof and by virtue of the laws of the State of Washington this defendant is now the legal owner of said property.

This defendant denies that the actions, doings and pretenses of this defendant, or either of the defendants, are contrary to equity and good conscience and tend to wrong, injure or oppress the plaintiff or any other person whomsoever.

This defendant avers that the plaintiff has no legal capacity to reimburse these defendants, or either of them, for any moneys expended in perfecting the title to the said property, or preserving the same against tax liens or otherwise, and further avers that the said plaintiff is without funds with which to do the same had he the legal capacity so to spend said funds, and therefore the plaintiff as this defendant avers is not legally capable of doing equity in the premises.

[65]

WHEREFORE this defendant prays that the bill of complaint be dismissed and that it go hence with its costs and disbursements.

BENJAMIN S. GROSSCUP,
WM. C. MORROW,
CORWIN S. SHANK,
HORATIO C. BELT,

Attorneys for Defendant, Seattle Water Front
Realty Company, a Corporation.

Rec'd copy of within Oct. 28, 1913.

BAUSMAN & KELLEHER,

Attys. for Pltff.

[Indorsed]: Amended Answer of Deft. Seattle Water Front Realty Co., a Corporation, to 2d Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 29, 1913. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [66]

[Opinion.]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MERCHANTS' NATIONAL BANK,
Plaintiff,

vs.

CHARLES H. BAKER et al.,
Defendants.

Filed Jan. 1914.

BAUSMAN & KELLEHER, for Plaintiff.

B. S. GROSSCUP, W. C. MORROW, CORWIN S. SHANK, H. C. BELT, for Defendants.

NETERER, District Judge.

This is an action commenced by John W. Schofield, as receiver of the Merchants' National Bank of Seattle, against Charles H. Baker and others to set aside a conveyance of certain tide land property, and to declare the respondent Seattle Water Front Realty Company, a trustee for the benefit of the creditors of the Merchants' National Bank. Notice and

application for commission to take depositions together with interrogatories to be answered by John W. Schofield, receiver, and F. P. Kane, Comptroller of Currency, are presented. Objections to certain interrogatories are filed on the part of the plaintiff. The interrogatories propounded to F. P. Kane and objected to are as follows:

“5. By whom were you first made acquainted with this claim?

7. Has John W. Schofield or yourself any funds or property belonging to the Merchants' National Bank? If so give a detailed list thereof.

9. State when the last entries were made in the accounts of this bank.

10. State at whose instance, request or suggestion was the resignation of A. W. Frater, as receiver, asked for, and John W. Schofield appointed receiver of the Merchants' National Bank.

11. Is it not a fact that the Merchants' National Bank, or the receiver thereof, have not now any property or assets whatsoever? [67]

12. Is it not a fact that there have been no funds or other property in the said estate since A. F. Frater, as receiver, made his final account to the Comptroller of the Currency.

13. Have you or any of your subordinates had any correspondence with the attorneys for the plaintiff, or anyone else, bearing upon this litigation? If you answer this question in the affirmative, attach hereto a copy of all letters written and copies of the replies thereto, and designate them as exhibits to your deposition.”

Interrogatories propounded to Schofield and objected to are:

“6. At the time you were appointed receiver of the Merchants’ National Bank did you receive any funds or any property, and if so give a detailed statement of such funds and property.

7. Have you received since your appointment any funds or property, and if so give a detailed statement of such funds and property.

8. Have you now any funds or property, and if so give a detailed statement of such funds and property.

9. If you answer the last question in the affirmative, state when and where you acquired these funds or property.

10. Have you had any correspondence with reference to this litigation with anyone? If so attach hereto copies of the letters which you have written, and also the replies you have received thereto, or other letters that you have received bearing upon the subject matter of this litigation.”

I think from a reading of the interrogatories the conclusion is inevitable that each and all of said interrogatories seek to elicit information which is entirely irrelevant to the issues in this case. What concern can it be to the defendants as to the facts upon which the Comptroller of the Currency based his judgment in the appointment of a receiver and directed the action to be instituted? What benefit could accrue to the defendants by information as to what funds, if any, were turned over to the plaintiff receiver, or what right have the defendants to a detailed statement of funds and property in the posses-

sion of the plaintiff receiver. The information sought by these inquiries are questions which are referred to the judgment and discretion of the Comptroller of the Currency, and his determination is conclusive.

Sanger vs. Upton, 91 U. S. 45, 59. [68]

This principle was also applied in the case of Cadle, Receiver, vs. Baker & Co., 20 Wall. 650, 651, in which the Court held:

“It is sufficient for the purpose of a suit that he has been appointed, and is receiver in fact. As to debtors, the action of the Court in making the appointment is conclusive until set aside on the application of the bank. The bank may move in that behalf, but the debtor cannot.”

See, also, Cassey vs. Galli, 94 U. S. 673.

The information sought in interrogatories 10 and 13, respectively, is too broad and indefinite. There is certain information with relation to the correspondence which would, under the issues in this case, undoubtedly be material, and to the possession of which the defendants are entitled, but the scope of the interrogatories 10 and 13 are entirely too comprehensive. The suggestion that the communications in the Comptroller's office and of Schofield, the receiver, are privileged and come within “secrets of state,” need not be discussed at this time. That is a broad question, the scope of which has many ramifications; and I do not think it is necessarily involved in the dispositions of these objections.

The objections to the interrogatories indicated are sustained.

JEREMIAH NETERER,

Judge.

[Indorsed]: On Motion to Strike Certain Interrogatories. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 8, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [69]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of MER-
CHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON, and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Decree.

This cause having come on to be heard on the 26th day of February, 1914, on the issues framed by plaintiff's second amended complaint and the several answers of defendant Charles H. Baker and of defendant Algernon S. Norton, and the amended answer of defendant Seattle Water Front Realty Company; and plaintiff appearing by his counsel, Messrs. Bausman, Kelleher, Oldham & Goodale, and defendants severally by their counsel Messrs. B. S. Grosscup and Corwin S. Shank, and the cause being submitted and testimony heard on behalf of the com-

plainant and of the defendants, and the Court being advised by argument of counsel on both sides, and the Court having taken under advisement the matters of fact and questions of law therein involved, and having filed herein on the 11th day of March its written opinion thereon, it is

ORDERED, ADJUDGED AND DECREED:

(a) That the pretended sale by defendant Charles H. Baker, as receiver of Merchants' National Bank of Seattle, to Sol G. Simpson of Block 430 of Seattle Tide Lands, King County, State of Washington, by and through an assignment to Sol G. Simpson of [70] a certain tide land contract issued to the Merchants' National Bank of Seattle by the State of Washington and known as tide land contract No. 728 in the records of the State Land Office of the State of Washington, which assignment was of date November 26, 1897, be and the same is now declared to have been fraudulent and to have been assigned for the secret use and benefit of defendant Baker himself as an individual; and that no interest whatever in said contract and said Block 430, or either of them, passed in equity to said Simpson, but that all right, title, and interest in and to said contract and the lands therein covered remain an asset of the Merchants' National Bank of Seattle, its then receiver, and his successors in the trust, including the present complainant herein.

(b) That any and all repurchases of said tide land contract or of Block 430 aforesaid by defendant Charles H. Baker as an individual, whether oral or in writing, are hereby declared fraudulent and void as against the insolvent Merchants' National Bank

of Seattle, its then receiver and his successors in that trust, including complainant, and that all conveyances of Block 430 or assignment of the tide land contract aforesaid by Sol G. Simpson to defendant A. S. Norton are declared fraudulent, void and null as against the aforesaid bank and its receiver and his successors in the trust; that all interest in the aforesaid contract and in Block 430 aforesaid has remained an asset of the insolvent Merchants' National Bank of Seattle aforesaid, undisturbed by any pretended transfers from defendant Baker as receiver to defendant Simpson and by Simpson to defendants Norton, and that said Block 430 of Seattle Tide Lands, King County, State of Washington, is now an asset of the insolvent Merchants' National Bank of Seattle, without regard to [71] any transfers or conveyances hereinbefore or hereinafter mentioned.

(c) That the conveyance by the State of Washington to defendant Norton of Block 430 aforesaid, dated October 16, 1905, is hereby declared to have passed no interest to the defendant Norton in his own right, either for himself or the defendant Baker, or their or either of their subsequent grantees, transferees, or assigns, in their own right, and that this conveyance from the State of Washington was placed in the name of Norton by fraud of the defendant Baker; that the title thus acquired by Norton at law is hereby declared to have passed in trust for the insolvent Merchants' National Bank of Seattle, its then and subsequent receiver, and his successors in the trust, and of right belongs to that trust, and the title thus passing from the State of Washington is

hereby declared to be an asset of that trust; and all declarations of trust issued by defendant Norton to defendant Baker are hereby declared null and void; and any and all conveyances by defendant Norton to the defendant Seattle Water Front Realty Company, each and all, are hereby declared ineffective as transferring any title in Block 430 to the defendant company other than for the use and benefit of the insolvent bank aforesaid, its then and subsequent receivers, including this complainant.

(d) That a certain lease of harbor area, known as Harbor Lease 181, running from the State of Washington, in favor of Sol G. Simpson, and covering land in front of Block 430, is hereby also declared an asset of the insolvent Merchants' National Bank of Seattle and its receiver, and the assignment thereof by Simpson to [72] defendant Baker, and by defendant Baker to defendant Norton, and by defendant Norton to defendant Seattle Water Front Realty Company, are each and all hereby declared void as against the insolvent Merchants' National Bank of Seattle and the complainant and his successors in the receivership for the Merchants' National Bank of Seattle, and that the interests of defendant Baker and his transferees therein are hereby declared to have been acquired in fraud of the rights of the receivership of the Merchants' National Bank of Seattle.

(e) The defendant Seattle Water Front Realty Company and its officers are hereby commanded to execute and deliver to the Clerk of this Court for plaintiff its deed in favor of the Merchants' National Bank of Seattle and John W. Schofield as receiver

of the Merchants' National Bank of Seattle, his successors and assigns, conveying by quitclaim all right, title and interest of the Seattle Water Front Realty Company in and to Block 430 Seattle Tide Lands, and also to deliver and deposit therewith an assignment to the aforesaid bank and to the aforesaid Schofield as such receiver of Harbor Lease 181, which deed and which assignment shall be regularly executed in conformity to the laws of the State of Washington, and the assignment of the lease to be absolute in form, together with the original lease itself; and upon default of compliance by the defendant Realty Company with this provision, the complainant may, if he so desire, have attachment or other process of this Court against the Seattle Water Front Realty Company, its officers, and defendants, Baker and Norton, its controlling stockholders, requiring each and all of them to execute and deliver each and all of the aforesaid instruments by, through and in the name of the defendant Realty Company, and complainant may have the clerk of this Court, upon, or without awaiting, any such default by the defendant Realty Company, execute in favor of complainant or his successors in the trust, a deed to Block 430 and an assignment of the harbor lease aforesaid [73] each in the name of the Seattle Water Front Realty Company, and the same, so executed, may then, with or without supplemental order of this Court, or showing to that effect by complainant, be made a good and sufficient deed of Seattle Water Front Realty Company.

(f) Neither the defendant Seattle Water Front Realty Company nor defendants Baker and Norton

shall be required to make, execute or deliver any of the aforesaid instruments until there shall have elapsed thirty days after the time in which appeal can be taken by defendant Seattle Water Front Realty Company, nor, in the event of appeal being taken by defendant Seattle Water Front Realty Company, until thirty days shall have elapsed after such appeal, if any, shall have been finally determined adversely to it and if, no appeal being taken by defendant Seattle Water Front Realty Company, or such appeal being adversely determined to it, the defendant Seattle Water Front Realty Company shall make such deposit of instruments as aforesaid, then within sixty days from such delivery of conveyances to the clerk of this Court, the complainant shall pay or cause to be paid into this Court for the defendant Realty Company, the sum of \$10,977.13, to wit, \$8,130.19 principal and \$2,846.94 interest, said principal being all the sums by the defendants expended in taxes upon the aforesaid Block 430 and Harbor Lease 181 and in payments directly or indirectly made to the State of Washington under the contract for Block 430 aforesaid and upon said lease, and should complainant fail so to do, he shall lose the benefits of this decree. The defendant company may immediately withdraw the aforesaid sum without further order of the Court.

(g) Nothing hereinbefore shall be construed to impair the effect of this decree as one in itself re-investing the title to Block 430 and of the contract upon which it was based and of the deed of the State of Washington based upon such contract, as hereinbefore [74] detailed, exclusively hereby and here-

with in the insolvent Merchants' National Bank of Seattle and complainant John W. Schofield as its receiver and his successors in that trust, forever, to be by him held, sold, managed, and accounted for as any other asset of such trust, but that the provisions hereinbefore requiring conveyance by the defendants are simply cumulative hereto. This decree hereby quiets the title to Block 430 Seattle Tide Lands, King County, Washington, forever in complainant and his successors in the trust, and each and all the defendants are hereby adjudged to be without, and they are forbidden and enjoined from asserting, any title contrary to that of complainant.

(h) It is further ordered that complainant recover of each and all the defendants herein his costs and disbursements to be taxed.

To all of which the defendants by their counsel present do each except, and their exceptions are allowed.

Done in open court this 1st day of Apr., 1914.

JEREMIAH NETERER,
District Judge.

Copy of within Proposed Decree received and notice of presentation for Mch. 23/14, acknowledged this 19th day of March, 1914.

Attorneys for Dfts.

[Indorsed]: Decree and Notice of Presentation Thereof. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 1, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [75]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the
MERCHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON, and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Petition for Appeal.

To the Honorable JEREMIAH NETERER, Judge
of the said Court:

Come now the above-named defendants, Charles H. Baker, Algernon S. Norton, and Seattle Water Front Realty Company, a corporation, and feeling themselves aggrieved by the final decree made and entered in the above-entitled court and cause on the 1st day of April, A. D. 1914, do hereby jointly and severally appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, Califor-

nia; and your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal and to supersede the said decree pending such appeal be made.

B. S. GROSSCUP,
CORWIN S. SHANK,
W. C. MORROW,
H. C. BELT,

Solicitors for Said Defendants.

[Indorsed]: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [76]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the
MERCHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON, and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Assignment of Errors.

Now, on this 27th day of May, A. D. 1914, came the defendants Charles H. Baker, Algernon S. Norton and Seattle Water Front Realty Company, a

corporation, by their solicitors Corwin S. Shank, B. S. Grosscup, Horatio C. Belt and W. C. Morrow, and each severally says that the decree entered in the above cause on the first day of April, A. D. 1914, is erroneous and unjust to these defendants:

I.

Because the plaintiff has no right or authority under the laws of the United States to maintain the action set forth in his second amended bill of complaint on which said cause was tried.

II.

Because the plaintiff has no authority and has at no time had any authority from the officers of the Government of the United States having jurisdiction of receiverships of national banks, to comply with the conditions of the decree which was rendered, or of any decree which under the issues might have been rendered, in that said officers had not prior [77] to the commencement of said suit, nor have they since the commencement of said suit, authorized the payment to plaintiffs or either of them of the money adjudged to be due under the findings of the Court and the money to which said plaintiffs would be entitled under any decree which might or could have been rendered.

III.

Because there is not and has not been for more than ten years last past available to the trust which the receiver represents in this action any funds with which to do equity to the plaintiffs and each of them.

IV.

Because the District Court erred in finding and adjudging that the defendant Baker had no author-

ity to sell Tide Land Contract No. 728 covering the purchase from the State of Washington of Tide Land Block 430 to Sol G. Simpson.

V.

Because the District Court erred in finding and adjudging that the defendant Baker, while acting as receiver of the Merchants' National Bank, did not make a *bona fide* sale of Tide Land Contract No. 728 covering Tide Land Block 430 to Sol G. Simpson, and in finding that the said Baker at the time of making said sale reserved to himself, for his own benefit and use, the said contract and an interest therein.

VI.

Because the District Court erred in finding and adjudging that the defendant Baker did not acquire an assignment of said Tide Land Contract No. 728 covering Tide Land Block 430 from Sol G. Simpson in good faith and in the usual course of [78] business, and in finding that a trust attached in favor of the Merchants' National Bank, its stockholders and creditors, to the title acquired by the said Baker from the said Simpson.

VII.

Because the District Court erred in finding and adjudging that the title acquired by the defendant Baker from the State of Washington to the said Tide Land Block 430 was in trust for the use and benefit of the insolvent Merchants' National Bank, its creditors and stockholders, and in holding that the title acquired by the defendant Water Front Realty Company was and is subject to said trust.

VIII.

Because the District Court erred in finding and adjudging that the plaintiff's action was not, prior to its commencement, barred by lapse of time and laches.

IX.

Because the District Court erred in finding and adjudging that plaintiff's action was not, prior to its commencement, barred by the statute of limitations of the State of Washington.

X.

Because the District Court erred in including in the decree the harbor area lease adjacent to and in front of said Tide Land Block 430 purchased by Sol G. Simpson from the State of Washington after the defendant Baker had ceased to be receiver.

XI.

Because the District Court erred in ordering the defendant Seattle Water Front Realty Company to hold said harbor [79] area lease for the use and benefit of the plaintiff and to convey legal title to the plaintiff.

XII.

Because the District Court erred in finding that the said harbor area lease was at any time a part of the trust of the Merchants' National Bank.

XIII.

Because the District Court erred in finding and adjudging that the stock of the defendant A. S. Norton in the defendant Seattle Water Front Realty Company, which was issued to said Norton in consideration of an undivided 3% interest, purchased by said Norton from said Baker prior to the convey-

ance to said defendant Seattle Water Front Realty Company, was not a *bona fide* purchase by said Norton, and the Court erred in holding that said 3% interest was subject to said trust of the Merchants' National Bank and its receiver.

XIV.

Because the District Court erred in finding and adjudging that the interest in the defendant Seattle Water Front Realty Company owned by A. S. Norton in the form of stock purchased by him after the formation of said company, and the interest in said company owned by the Union Savings Bank & Trust Company of Seattle in the form of stock assigned to said company, is subject to the trust decreed by the Court in favor of the plaintiff.

XV.

Because the District Court erred on the trial in admitting, over the objections of the defendants, that portion of the testimony of the witness Francis Rotch wherein it [80] appears that the said Rotch, in answer to a question to state a conversation with Sol G. Simpson in 1890, testified:

“Mr. Simpson was turning a great many things over to me and of course I opened a great deal of his mail, unless it was marked Personal, and I came across a notice from the Land Commissioner saying that there was a payment due and interest due on Block 430 and so I went to Mr. Simpson and asked him whether I should pay it or not * * * . That was in the year 1900—the end of 1900. I have refreshed my memory about that. He said, ‘Yes.’ He said ‘Pay that.’ He says, ‘That belongs to Charlie

Baker,' and then I said, 'Shall I pay it?' and he says, 'Yes, pay it.' And then I paid it and made the entry of it in my books and charged Mr. Baker with that payment, but that was all the conversation we had at that time as I remember it."

And after a further question, as follows:

"It came up again about two years later—I think 1902; I am not quite certain about that, and Mr. Simpson was hard up in those times. He had a good deal of property but did not have much money and we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said: 'Now, can't we get rid of this Block 430?' I thought maybe at that time probably he got it from Baker or something of the kind. He said, 'No, Mr. Baker put that in my hands and I have to hold it in trust for him right along.' He said, 'We cannot dispose of that.' "

And further, in answer to a question by plaintiff's counsel:

"Q. Just the same, he told you in substance that he was carrying that property for Charlie Baker, or words to that effect?

"A. Yes, sir.

"Q. And that he never had any interest in it?

"A. Yes."

To all of which testimony, and the questions eliciting the same, objection was made at the time on the ground that the evidence was hearsay, immaterial and irrelevant.

XVI.

Because the District Court erred in admitting on the trial the evidence of the witness Lester Turner over the objection of the defendants, that in 1898 or 1899 he, the witness, had a conversation with Sol. G. Simpson as follows: [81]

“The conversation came up in this way: I was talking to Mr. Simpson in regard to tide land holdings that the bank held. It owned quite a large amount of tide lands and he was director of the bank, and I talked to him about the plans of the bank and in that connection I asked him about his own holdings down there. I knew that he held some tide lands. And he told me that a portion of those lands belonged to Charlie Baker—that he was carrying the title for him to accommodate him.”

And also the following in response to a question as to a later conversation:

“I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way incidentally to the properties and I asked him how he came to hold the title to that property that belonged to Baker. ‘Well,’ he said, ‘Baker did not want it known that he had taken the property while he was receiver of the bank and it might not bear investigation,’ and he was carrying it for that reason.”

Which testimony was objected to by defendants’ counsel as hearsay, immaterial and irrelevant.

XVII.

Because the District Court erred in rendering a

decree in favor of the plaintiff, which decree is contrary to the testimony and against the law because the equity of the case entitled the defendants to a decree of dismissal.

Wherefore, the defendants and each of them pray that the said decree be reversed and the District Court directed to dismiss the bill; and for such other relief as the defendants and each of them are entitled to in equity.

CORWIN S. SHANK,
H. C. BELT,
B. S. GROSSCUP,
W. C. MORROW,

Solicitors for Defendants, Seattle Water Front
Realty Company and Charles H. Baker and
Algernon S. Norton.

[Indorsed]: Assignments of Error. Filed in the
U. S. District Court, Western Dist. of Washington.
May 27, 1914. Frank L. Crosby, Clerk. By Ed M.
Lakin, Deputy. [82]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the
MERCHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON, and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,

Defendants.

Order Allowing Appeal and Fixing Supersedeas.

The above-named defendants having heretofore filed herein their petition for appeal from the final decree herein and assignment of errors, and having petitioned for a supersedeas of said decree; now, therefore, it is hereby

Ordered, that the said petition be granted, and the said appeal is hereby allowed and is to operate as a supersedeas of the final decree herein upon the execution of a bond as required by law in the sum of \$2,500.00.

Dated this 27th day of May, 1914.

JEREMIAH NETERER,

Judge.

[Indorsed]: Order Allowing Appeal and Fixing Supersedeas. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [83]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the
MERCHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON, and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,

Defendants.

Appeal and Supersedeas Bond.

Know All Men by These Presents, that we, Seattle Water Front Realty Company, a corporation, Charles H. Baker and Algernon S. Norton, as principals, and the United States Fidelity & Guaranty Company, as surety, are each, jointly and severally, held and firmly bound unto John W. Schofield, Receiver of the Merchants' National Bank of Seattle, the plaintiff in the above-entitled suit, in the just and full sum of Twenty-five Hundred Dollars (\$2,500.00), lawful money of the United States, for which money, well and truly to be paid, we each, jointly and severally, bind ourselves, our successors, heirs, administrators and assigns.

Sealed with our seals and dated this 25th day of May, A. D. 1914.

The condition of this obligation is such that whereas the above-named plaintiff, John H. Schofield,

receiver of the Merchants' National Bank of Seattle, on the 1st day of April, A. D. 1914, recovered a decree against the above-named defendants in the District Court of the United States for the Western District of Washington; and whereas the above-named defendants, and each of them, have instituted proceedings for an appeal from said decree of the District Court of the United States for the Western District of Washington to the United States Circuit Court [84] of Appeals for the Ninth Circuit;

Now, therefore, if the said defendants and appellants shall prosecute their appeal to effect and answer all damages and costs if they or either of them fail to make good his or their plea, including damages for delay and costs and interest on the appeal, not exceeding, however, the sum of Twenty-five Hundred Dollars (\$2,500.00), then this obligation shall be void; otherwise to remain in full force and effect.

SEATTLE WATER FRONT REALTY
COMPANY.

By B. S. GROSSCUP,
Its Solicitor Duly Authorized.
CHARLES H. BAKER,

By B. S. GROSSCUP,
Its Solicitor Duly Authorized.
ALGERNON S. NORTON,

By B. S. GROSSCUP,
Its Solicitor Duly Authorized.

UNITED STATES FIDELITY & GUAR-
ANTY CO.

By HARRY C. MILLER, [Seal]

Attorney in Fact.

The foregoing bond approved this 27th day of May, A. D. 1914.

JEREMIAH NETERER,
Judge.

[Indorsed]: Appeal and Supersedeas Bond. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [85]

*In the District Court of the United States for
the Western District of Washington, Northern
Division.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, Receiver,
Plaintiff,

vs.

CHARLES H. BAKER et al.,
Defendants.

Defendants' Proposed Statement of Testimony.

B. S. GROSSCUP,
W. C. MORROW,
CORWIN S. SHANK,
H. C. BELT,

Attorneys for Defendants. [86]

Amendments.

At the opening of court the plaintiff amended the second amended complaint, changing the number of the block from that of #431, as set forth in the complaint, to #429.

Pursuant to notice given by the defendant three months previously, the defendant Baker made certain amendments to his answer, as follows:

From the end of paragraph IV by striking out

line 29, page 3, and substituting therefor “which purchase was agreed upon in the spring of 1899 and finally consummated in 1905.”

On page 6, paragraph 7, lines 5 and 6, by striking out the words “this defendant’s termination of said trust,” and substituting therefor “about the month of March, 1899.” And on lines 7 and 8 by striking out the words “while this defendant was receiver,” and substituting in place thereof “prior to that date.”

On page 10, paragraph XII, line 2, by striking out the words “his connection with said trust had ceased,” and substituting therefor “S. G. Simpson had purchased this assignment of said contract.”

On page 10, line 13, after the word “laches” by adding “and by lapse of time.”

On page 3, line 27, by changing the word “repurchased” to the word “purchased.” [87*—1†]

Statement of Testimony.

The plaintiff offered in evidence a certificate showing that Archibald W. Frater resigned and the plaintiff John W. Schofield was appointed receiver of the Merchants’ National Bank of Seattle, Washington, on February 11, 1913 (Plaintiff’s Exhibit 1).

There were two maps introduced in evidence showing the tide land properties of Seattle (Plaintiff’s Exhibit 2)—one being introduced by the plaintiff and the other by the defendant. The original maps by stipulation are on file with the record.

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Defendants’ Proposed Statement of Testimony as Same appears in Certified Transcript of Record.

The following letters were introduced in evidence by the plaintiff:

Plaintiff's Exhibit 3 [Letter, Dated January 26, 1897, Chas. H. Baker, Receiver, to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Answered.

Feb. 13, 1897.

Org. Div. K.

Office Comptroller

Feb. 11, 1897,

of Currency.

Seattle, Wash. Jan. 26, 1897.

Hon. James H. Eckels,

Comptroller of Currency,

Washington, D. C.

Dear Sir:

By virtue of being an upland owner of property bordering upon Seattle Harbor this bank is entitled to the prior right to purchase from the state certain contiguous tide lands as under the rulings of the tide and commission may be awarded. The law gives the right to contract for such purchase in ten annual payments, which contracts are assignable. This right of purchase is a valuable asset of the trust and accordingly I respectfully ask you to ratify the following contracts between the State and myself as receiver:

All of Block 429.....	Appraised value \$	664
Lots 13 to 18 Block 444.....	Appraised value	24
Lots 1 to 8 & 13 to 20 Block		
432.....	Appraised value	472

All of Block 430.....Appraised value 1488
Lots 3 to 11 Block 443.....Appraised value 167

Very respectfully

CHAS. H. BAKER, Rec. [88—2]

**Plaintiff's Exhibit 4 [Letter, Dated February 13,
1897, Deputy and Acting Comptroller of the
Currency, to Charles H. Baker, Receiver].**

Treasury Department, Washington.

Office of

Comptroller of the Currency.

Address reply to

Comptroller of the Currency.

February 13, 1897.

Mr. Charles H. Baker,

Receiver, Merchants' National Bank,

Seattle, Washington.

Sir: Your letter of the 26th ultimo is received, in reference to the ownership of the bank to property bordering upon Seattle harbor and its right to purchase from the State certain contiguous tide lands.

In view of your statement, you are hereby authorized to contract with the State for the purchase of the lands described in your communication, and, inasmuch as the contracts are assignable, they can no doubt be disposed of to advantage at any time, should such a course seem advisable.

Very respectfully,

(Signed) GEO. M. COFFIN,

Deputy and Acting Comptroller.

Plaintiff's Exhibit 5 [Letter, Dated October 29, 1897, Chas. H. Baker, Receiver, to Comptroller of Currency].

No. 2985.

**THE MERCHANTS' NATIONAL BANK,
CHAS. H. BAKER,
Receiver.**

Office Comptroller
Nov. 4, 1897,
of Currency.

Seattle, Wash., Oct. 29th, 1897.

Hon. James H. Eckels,
Comptroller of Currency,
Washington, D. C.

Answered
Nov. 10, 1897.
Insolvent Banks

Dear Sir:

I am in receipt of your favor of the 18th relative to the report of Mr. Seeley, Examiner, upon the condition of this trust. As to a reduction of expenses in this trust, I suggested to Mr. Seeley that he recommend to you the cancellation of the contract with the attorneys on January 1st next, under which they are paid \$200 a month. The litigation is nearly all closed excepting several important suits which are either on appeal or will be disposed of definitely within that time, and if not probably the compensation to Jan. 1st could be made to cover the services in any event. This recommendation of course does not apply to attorneys employed in New York, Chicago, Milwaukee and San Francisco who are to receive specific fees for services rendered, subject to your approval. Further retrenchment would be detrimental.

I have discontinued the payment of taxes on the trusts real estate, which I respectfully request you to endorse as a measure of economy, for the reason that under our law such property is safe from levy and sale for two years with an additional [89—3] two years redemption, and also because I find the incumbrance of taxes does not materially affect the prices which I am able to get in sale or trade. I visited last spring the final sales of your receivers in Tacoma, and I noticed that often the amount of taxes due was not inquired into until after the item had been purchased, and there seemed to be a general indifference as to whether the property was clear or not. The taxes in this trust amount to several thousand dollars.

The progress made in the collection of assets has not during the last year been as great as could be desired, but nevertheless under the conditions prevailing a better showing could not have been made. The last year here has been the worst of all during the depression and the situation has been distressing and hard to picture correctly to one not living here. Within six weeks however there has been a very marked improvement, due to the successful and high priced crops, Alaska trade and an active shingle market. The conditions warrant the belief that the spring will open up here with a flood of prosperity, all of which will enable people to liquidate and will give rise to a market for real estate. This is apparent already in several exchanges which I have effected on a basis of several hundred per cent in excess of my estimated value. I expect to reduce the total liability of the trust from 25% to 50% of trad-

ing off assets that hardly have a cash value, and this will facilitate more frequent and larger cash dividends to those still holding claims.

My note which is among the charged off paper in the bank is in the same situation as formerly. At the request of Mr. Seely, Judge Stratton who is one of the ablest lawyers at the bar, very thoroughly investigated this matter, and advises that I am correct in my contention that the bank is liable to me for \$2500 rather than I to it for \$9500. Mr. Lewis who was my attorney at the time of the failure held the same opinion, and had at the time prepared papers for a suit against the bank to compel an accounting, but was deterred from serving them by the failure and my subsequent appointment. The history of the case and its status Mr. Seeley will, so he informed me, give to you in a special report upon his return to Washington. The chief wrong to me appears in the fact that the bank sold my collateral bonds under an execution upon a judgment obtained against another company to which I was not a party. These bonds when they are afterwards reconverted by the bank for \$12000 should have retired my note and given me the \$2500 surplus. Aside from any pecuniary advantage I would have in prevailing against the trust in a suit at law, I have felt that I would like to vindicate my position in the matter through the courts, but this seems inconsistent with my relations to the trust. I have also felt that, assuming I am in error in my contention, the fact will be more than offset by the particular and full value that my personal efforts will give to the bonds of the Third St. Ry. which as referred to

above came into the trust indirectly through my note, the payment of which while the bank was still solvent, would, the former officials stated, have retired the note at the same time. These bonds are of questionable value now, but under the general consolidation of the surface roads here which I expect to carry through this winter, the bonds will have a high value or may become cash, and upon a larger scale than other holders of the same bonds will realize. The financial end of the reorganization I have arranged—the only embarrassment being the temporary disinclination [90—4] of the road controlled by N. W. Harris & Co. to go in. The expense of surveys, printing, travelling and clerical work incidental to promoting this consolidation I have borne personally for three years, which fact has kept me poor. As a direct result of this reorganization, no greater advantage will accrue to any one interest relatively than to this trust. Aside from any equitable defense there may be to the note bearing my signature, any disinterested person will advise that it has no value, though for me to officially so pronounce would probably be out of place.

Appearances now indicate that the most active period of the trust, second only to the first six months of its life, will soon occur, and I anticipate that some of the slowest of the assets can be handled to advantage and considerable cash realized. The widespread advertising given to this particular section on account of the Klondyke gold excitement, and the consequent impetus given to trade and emigration here, will soon prove a factor of profit to the trust

not considered in making estimates.

Very respectfully,

CHAS. H. BAKER,

Receiver.

**[Statement of Testimony of E. C. Townsend, on
Behalf of Plaintiff.]**

E. C. TOWNSEND was called on behalf of plaintiff and testified that he was then and had been for nearly eight years connected with the State Land Office at Olympia. He produced the contract with the State covering block 430, which together with the assignments and acknowledgments reads as follows:
[91—5]

**Plaintiff's Exhibit 6 [Agreement, Dated January 12,
1897, State of Washington and Merchants'
National Bank of Seattle].**

WATERWAY LIEN CLAUSE.

Original.

THIS AGREEMENT, Made in duplicate this 12th day of January, 1897, by and between the State of Washington, party of the first part, and The Merchants National Bank, of Seattle, King County, Washington, of the second part, pursuant to an act of Legislature of said State entitled "An act to provide for the selection, survey, management, lease and disposition of the State's granted, tide, oyster and other lands, harbor areas, and for the confirmation and completion of the several grants to the State by the United States, creating a Board of State Land Commissioners, defining their duties and authorizing them to act as the commission provided for in article 15 of the State Constitution, and declaring an emer-

gency," approved March 26, 1895:

WITNESSETH, That the party of the first part, in consideration of the sum of Fourteen Hundred Eighty-eight and no/100 (1488.00) Dollars, to be paid as hereinafter agreed, and of the faithful performance of the covenants, agreements, and conditions hereinafter expressed, on the part of the part— of the second part to be performed and kept, hereby agrees to sell to the part— of the second part the certain tract or parcel of tide land of the first class, situated in King County and State of Washington, described as follows, to wit:

All of Block Four Hundred Thirty (430), according to the survey thereof, as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners, at Olympia, Washington, on the 15th day of March, 1895.

Subject, however, to any lien or liens that may arise or be created in consequence of or pursuant to the provisions of an act of the Legislature of the State of Washington entitled "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state," approved March 9, 1893.

And the party of the second part hereby covenants and agrees to purchase of the party of the first part the above described land, and to pay therefor the full sum of Fourteen Hundred Eighty-eight and no/100 (1488.00) Dollars in manner following, that is to say :

The sum of \$148.80 at or before the execution of this contract, the receipt whereof is hereby acknowledged.

The sum of \$148.80 principal and \$10.72 interest, on the first day of March, 1897.

The sum of \$148.80 principal, and \$71.44 interest, on the first day of March, 1898.

The sum of \$148.80 principal, and \$62.51 interest, on the first day of March, 1899. [92—6]

The sum of \$148.80 principal, and \$53.58 interest, on the first day of March, 1900.

The sum of \$148.80 principal, and \$44.65 interest, on the first day of March, 1901.

The sum of \$148.80 principal, and \$35.72 interest, on the first day of March, 1902.

The sum of \$148.80 principal, and \$26.79 interest, on the first day of March, 1903.

The sum of \$148.80 principal, and \$17.86 interest, on the first day of March, 1904.

The sum of \$148.80 principal, and \$8.93 interest, on the first day of March, 1905.

And the said second party covenants and agrees to pay said principal sum and interest as above specified at the rate of six per cent per annum in gold coin of the United States, at the office of the State Treasurer at the capital of said state, and that it will pay all taxes and assessments of every kind that may be levied or assessed on said land and premises, and that if said second party shall fail to pay any of the sums above specified, either of principal, interest, taxes or assessments, when the same shall become due and for six months thereafter, it will, on demand of the Board of State Land Commissioners or other

authorized officer of the State, quietly and peaceably surrender the possession of the above described land and premises and every part thereof; and upon the failure to pay as above specified, all rights of said purchaser under this contract, may, at the election of said Board of State Land Commissioners acting for the State of Washington, and without notice to said purchaser, be declared forfeited, and when so declared forfeited and thereupon the state shall be released from all obligation to convey said land; and all payments theretofore made on this contract, and any and all improvements made on said land, or any part thereof shall thereupon be forfeited to and belong to said State of Washington.

But if said party of the second part shall well and faithfully keep and perform all the covenants and agreements hereinbefore specified by it to be kept and performed in the manner and at or before the times above specified, it shall be entitled to a patent to said land from said State of Washington as provided by law upon surrender of this contract and cancellation of same.

The terms of this contract shall be binding in favor of and against the said party of the second part, its successors and assigns, but no assignment of this contract shall in any way relieve the said party of the second part from the performance of the conditions hereof on its part, nor be recognized nor admitted by said State of Washington, unless the same shall be endorsed hereon and executed, witnessed and acknowledged in the same manner as a conveyance of real estate is required by law to be, and said assignment, shall be accepted by and entered

on the records of the Commissioner of Public Lands; nor shall any such assignment of the party of the second part for less than the entire interest of said [93—7] party to the whole of the lands above described be recognized or admitted.

IN TESTIMONY WHEREOF, the party of the first part, by the Commissioner of Public Lands, and the party of the second part have hereunto subscribed their names in duplicate.

THE STATE OF WASHINGTON.

By W. T. FORREST,

Commissioner of Public Lands.

THE MERCHANTS' NATIONAL BANK.

By CHAS. H. BAKER, Receiver,

Purchaser.

P. O. Address: Seattle, King County, State of Wash.

Witness the signature of purchaser:

M. E. REED.

C. I. PRITCHARD,

STATE OF WASHINGTON.

Office of

COMMISSIONER OF PUBLIC LANDS.

Approved Jan. 22, 1898.

ROBERT BRIDGES,

Commissioner of Public Lands.

ASSIGNMENT.

The Merchants' National Bank, the within named purchaser, for and in consideration of the sum of (\$198.80) one hundred & ninety-eight 80/100 dollars, to it in hand paid by S. G. Simpson of the county of King, and State of Washington, do hereby

sell, assign and transfer all its rights, title and interest in and to the within contract and the lands therein described unto the said S. G. Simpson, heirs and assigns forever, and it does hereby authorize the State of Washington to receive from S. G. Simpson or assign the performance of all covenants and agreements in said contract specified to be performed by the party of the second part, and upon such performance to execute to him a patent as it would have been executed to it had this assignment not been made.

And S. G. Simpson, said assignee, hereby covenants and agrees to keep and perform all the covenants and conditions specified in said contract to be performed by the party of the second part.

Given under our hands and seals this 26th day of November, 1897.

THE MERCHANTS' NATIONAL
BANK. (Seal)

By CHARLES H. BAKER, Receiver,
Assignor.
S. G. SIMPSON, (Seal)

Assignee.

P. O. Address: Seattle.

In presence of—

JOS. B. HILL.

JOHN H. POWELL.

Witnesses to S. G. Simpson's signature:

THOMAS T. LITTELL.

JOHN H. POWELL. [94—8]

ACKNOWLEDGMENT.

State of Washington,
County of King,—ss.

I, John H. Powell, do hereby certify that on this 18th day of January, 1898, personally appeared before me Charles H. Baker, receiver of Merchants' National Bank of Seattle, to me known to be the individual described in, and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed as such receiver for the uses and purposes therein mentioned.

Given under my hand and official seal this 18th day of January, A. D. 1898.

(N. S.)

JOHN H. POWELL,

Notary Public for State of Washington, Residing
at Seattle, said State.

State of Washington,
County of King,—ss.

I, Thomas T. Littell, a Notary Public in and for the State of Washington, residing at Seattle, in the above-named County and State, duly commissioned, sworn and qualified, do hereby certify that on this 19th day of January, A. D. 1898, before me personally appeared S. G. Simpson to me known to be the individual described in, and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 19th day of January, A. D. 1898.

(N. S.)

THOMAS T. LITTELL,

Notary Public in and for the State of Washington,
Residing at Seattle in said County.

S. G. Simpson (and Mary M. Simpson, his wife) the within named assignee of the purchaser, for and in consideration of the sum of One Dollar to him in hand paid by Algernon S. Norton of Suffern, New York, does hereby assign, sell and transfer all his right, title and interest in and to the within contract No. 728 and the lands therein described as all of Block 430 Seattle Tide Lands unto the said Algernon S. Norton, his heirs and assigns forever, and I hereby do authorize the State of Washington to receive from Algernon S. Norton or his assignee or successor the performance of all covenants and agreements in said contract specified to be performed by the party of the second part, and upon such performance to execute to him a Patent as it would have been executed to the said Simpson, had this assignment not been made and Algernon S. [95—9] Norton, the said assignee, hereby covenants and agrees to keep and perform all the covenants and conditions specified in said contract to be performed by the party of the second part.

Given under my hand and seal this 11th day of August, 1905.

S. G. SIMPSON,

By M. E. REED,

Atty. in Fact.

MARY M. SIMPSON,

By M. E. REED,

Atty. in Fact.

ALGERNON S. NORTON.

Witnessed by,

R. C. FORCE,

NORWOOD W. BROCKETT,

BRONSON P. REYNOLDS,

As to Algernon S. Norton.

STATE OF WASHINGTON.

Office of

COMMISSIONER OF PUBLIC LANDS.

Approved Oct. 12, 1905.

H. P. NILES,

Assistant Commissioner of Public Lands.

State of Washington,

County of King,—ss.

DO HEREBY CERTIFY, That on this 11th day of August, A. D. 1905, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally came Mark E. Reed as the duly constituted and authorized attorney in fact of the within named S. G. Simpson and Mary M. Simpson to me known to be the individual described in and who executed the within instrument, as such attorney in fact, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned, and as the free and voluntary act and deed of the within named S. G. Simpson and Mary M. Simpson, principal, by him voluntarily done and executed for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, the day and year in this

certificate first above written.

(N. S.) NORWOOD W. BROCKETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

County of New York,
State of New York,—ss.

I, Louis B. Hasbrouck, a Notary Public in and for the State of New York, residing at No. 257 Broadway, Borough of Manhattan, New York City, in the above county and State, duly commissioned, sworn and qualified, do hereby certify that on the 7th day of September, 1905, personally appeared before me Algernon S. Norton, to me known to be the individual described in and who executed the above instrument, and who acknowledged to me that he signed and sealed the same as his free act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 7th day of September, 1905.

(N. S.) L. B. HASBROUCK,
Notary Public, Residing at No. 257 Broadway, Borough of Manhattan, New York City, in said County. [96—10]

State of New York,
County of New York,—ss.

I, THOMAS L. HAMILTON, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, DO HEREBY CERTIFY, That L. B. Hasbrouck, whose name is subscribed to the Certificate of the proof of acknowledgment of the annexed in-

strument, and thereon written was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county the 8 day of Sept., 1905.

[Seal]

THOS. L. HAMILTON,

Clerk. [97—11]

The witness then produced the contract issued by the State to the Merchants' National Bank covering block 429, which contract is identical in form with the contract covering block 430, excepting that the consideration named therein is \$664, and the annual payments are \$66.40 on principal and the accumulative interest. This contract was assigned by Baker to S. G. Simpson on November 26, 1897; the assignment being approved by the commissioner of public lands February 9, 1898. This same contract was assigned by S. G. Simpson to W. B. Hofius and William Pigott, December, 1899. This assignment was approved by the commissioner of public lands on December 14, 1899.

The witness then testified that he had the ledger with him showing the payments that had been made upon these blocks. That the first payment on contract #728, being block 430, was January 12, 1897,

amounting to \$148.80. The next payment was on March 1, 1897, amounting to \$148.80 principal and \$10.42 interest. That these payments were all the payments that were made on block 430 prior to November 26, 1897. The witness testified that as to contract #727, covering block 429, the first payment was made thereon on January 12, 1897, amounting to \$66.40. The next payment was made on March 1, 1897, amounting to \$66.40 principal and \$4.78 interest. That these payments constituted all that were made on contract #727 before November 26, 1897.

[Testimony of C. B. Bussell, for Plaintiff.]

C. B. BUSSELL was called as a witness for the plaintiff, and testified that he had resided in Seattle for 29 years, and that he was first a clerk for the Hopgrowers' Association, and after that was in the soap business for 2 or 3 years, and since 1889 had been in the real estate business. That he had [98—12] made a specialty of tide lands for about 20 years, buying and selling the tide-land property, and that he was familiar with the market values in Seattle. He stated that he knew the condition of the tide-land market in 1897. That in the summer of 1897—he thought in July—the Klondike discovery in Alaska took place. He stated that, in his opinion, in November, 1897, the fair market value of block 430 of Seattle Tide Lands was \$5,000. When he spoke of this valuation that he meant this would be the value of the contract upon block 430 exclusive of the other payments due to the State. He also stated that the original appraisements made by the

(Testimony of C. B. Bussell.)

State upon these tide lands were generally supposed to be a little low. That these prices were fixed in 1895, and that it was no trouble to sell at a margin above the State's prices.

On cross-examination Mr. Bussell, in answer to a question as to whether he has not been generally known in Seattle as a tide-land enthusiast, stated that he supposed he might be called that, and that he had been so told. He also stated in answer to a question asked by Mr. Shank.

Q. And, as a matter of fact, before anyone else ever conceived the idea that there might possibly be values in tide lands, you constantly advanced the idea that there was a future value in tide lands, didn't you? A. Yes, sir.

The witness then testified that he was one of the original tide-land boomers of Seattle. He stated that he had no recollection of any sales of tide lands west of the West Waterway in 1897, 1898, or 1899, excepting possibly that he heard of some in 1899, but did not recall a specific instance.

The witness testified that in 1896 he had bought the contested rights in lots 25, 26, 27, 28, 29, and 30, in block 431, and had paid \$200 for them. That this was before any payments [99—13] had been made to the State on account of the contracts. That in 1900 he had sold these lots to a man by the name of Chappelle for \$15,000. The witness was then asked whether he knew of any other sales west of the West Waterway prior to 1905, and he answered that he did not know, but he did hear of some sales west of

(Testimony of C. B. Bussell.)

the West Waterway in the fall of 1905.

“Q. (By Mr. SHANK.) Now, is it not a fact that the tide-land movement in Seattle commenced properly in 1905?

A. Well, the greatest inflation was about that time, but there was a steady growth all along, from the time the tide lands were appraised by the State in 1895.

Q. How far from shore is block 430, measuring it from the westerly shore line, how far is block 430 from the shore?

A. I should think something like 2,500 *hundred* feet; it may be 3,000 feet.

Q. Measuring it from the upper end of the bay, how far is it from the shore?

A. I would suppose at least a mile.

Q. Is it not farther than that, as a matter of fact?

A. Maybe a little farther.

Q. From the head of the bay it is a mile and a half or two miles?

A. Considerably over a mile, maybe a mile and a half.

Q. And it is a half a mile out in the bay, measured from the nearest point of land? A. Yes, sir.”

The witness then testified that the lots that he had purchased from Capt. Nugent in block 431 were not included in the district covered by the Semple contract.

On redirect examination the witness testified that block 430 was regarded as the best block west of the West Waterway. That it had a water frontage on

(Testimony of C. B. Bussell.)

the bay carrying with it the harbor area in front; also had a water frontage on the West Waterway of approximately 1,000 feet, which gave an added value to that particular block over block 431, which is adjoining it. That block 430 had always been regarded by him as more valuable than the same amount of land in block 431. The witness testified that the value of the block had not been affected [100—14] materially by the fact that it was within the tide-land district which permitted the filling of the property for the reason that it was generally supposed that this land would never be filled, even though there was a contract existing on it for filling, and that this was not considered in estimating values on this land. That he personally in his operations never paid any attention to this contract. The witness further stated that during the years 1896, 7 and 8 there were a great many contests on tide-land property, and that these rights were often sold for a valuable consideration. The witness testified that the preference right during these years was frequently sold irrespective of the contest that was being waged upon the property.

On cross-examination the witness testified that the lots which he got from Capt. Nugent in 1896 had increased in 1897 to about \$2,000, and in 1898 to about another \$2,000; in 1899 probably to \$8,000, and in 1900 to \$15,000. That he regarded the relative increase on block 430 as even greater than this.

On redirect examination the witness testified that he was a tide-land boomer, and that by reason of his

(Testimony of A. P. Hill.)

confidence he had made one million dollars, and a good deal more than that.

[Testimony of A. P. Hill, for Plaintiff.]

A. P. HILL, a witness called on behalf of the plaintiff, testified that he had resided in Seattle for 25 years, nine-tenths or ninety-five per cent of which time he had been in the real estate business. That he was in the real estate business from 1897 to 1903. That during 1898 to 1902 he was not in the real estate business, but had kept in touch with valuations. He also stated that he was acquainted with tideland values in Seattle from the year 1899 down to the present time. He gave it as his judgment that tideland contract #728 on block 430 in 1897 was worth \$4,800. He also expressed it as his opinion that the ownership of this block carried with it the right to purchase the harbor area. The witness stated that he is a brother of J. B. Hill, who in 1897 was a clerk in the office of the receiver, Mr. Baker. [101—15]

On cross-examination the witness testified that in 1897 that there were no tide lands selling in the locality of this property, and that there was very little doing in tide lands until 1905. That prior to 1905 there were sales made in that locality, but not very many; there was no great activity. That up to 1905 tide land west of the East Waterway, which included the section embracing Harbor Island and all west of it, was regarded as speculative, and that it was held up to that time purely for speculative purposes.

(Testimony of A. P. Hill.)

On redirect examination the witness testified that in 1899, William Pigott had bought certain tide lands in that district.

It was then admitted by Mr. Grosscup on behalf of the defendants that the petition and order attached to the second amended bill of complaint in this case is a true copy of the petition filed and the order made by this court, and that there was no other petition or order to this or to any court of record than the one attached to the petition affecting block 430.

Counsel for plaintiff then offered in evidence a letter dated October 9, 1897, from William L. Seeley, special examiner, addressed to James H. Eckels, Comptroller of the Currency; the letter being marked Plaintiff's Exhibit 8, and the report attached thereto, the same [102—16] reading as follows:

Plaintiff's Exhibit 8 [Letter, Dated October 9, 1897, Special Examiner to Comptroller of the Currency].

Treasury Department,	
Office of Comptroller of the Currency,	
Address Reply to	Office Comptroller
Comptroller of the Currency,	Oct. 16, 1897,
Washington, D. C.	of Currency.
Seattle, Wash., Oct. 9, 1897.	
Hon. James H. Eckels,	
Comptroller of the Currency,	
Washington, D. C.	

Dear Sir:

Herewith I hand you my report upon the condition of the affairs of the Merchants' National Bank

of Seattle, Washington; also certified copies of petition and order authorizing compromise and private sale of the bad and doubtful assets of the trust.

Hoping my action in the premises will meet with your approval, I am

Very respectfully,

WM. L. SEELEY,

Special Examiner.

**[Report of Special Examiner to Comptroller of the
Currency.]**

Treasury Department,

Office of Comptroller of the Currency,

Address Reply to

Comptroller of the Currency,

Washington, D. C.

Seattle, Wash., Oct. 9, 1897.

**IN RE THE MERCHANTS' NATIONAL BANK,
SEATTLE, WASHINGTON, IN LIQUIDA-
TION.**

Hon. James H. Eckels,

Comptroller of the Currency,

Washington, D. C.

Sir: There does not appear to be any material change in the condition of the affairs of this trust, except in reducing to possession and control the real estate held as security by judgments and decrees of foreclosure, and bidding the same in at the sale thereof. The securities so held have been in a majority of cases foreclosed and sheriff's deeds in many, and certificates in others, obtained, in the latter the trust being entitled to deeds within a period of from

one to six months. The foreclosure of a portion of such securities is pending, wherein decrees have been obtained, and the sale will be made without delay.

The receiver is proceeding under the authority given him by you to exchange real estate holdings of the trust for [103—17] receiver's certificates. The disposition of the real estate in this manner is to the interest of the creditors of the trust. From one to five hundred per cent. more can be obtained for such assets than if disposed of at private or public sale. While it is true that there is a material improvement in Seattle, and inside business and dwelling property has appreciated, the effect has not been felt in outside additions, and it is not probable that the holdings of the trust will appreciate to any considerable extent during the life of the receivership. In any event the valuation placed upon the real estate by the receiver in making the exchange for receiver's certificates at their face is sufficient to meet any natural advance and made the exchange favorable and to the interests of all concerned.

I do not find any material appreciation of the assets or change in conditions which justifies reporting thereon in detail, these matters being heretofore fully reported by me. The remaining assets are practically bad and doubtful, from which in my judgment more can be obtained by compromise and private sale than through an attempt to enforce collection, or their disposal at public auction. It is the judgment of the receiver and his attorneys, and it appears to be to the interest of the creditors of the trust, that the receiver have full power and au-

thority to so compromise and sell privately the remaining assets, and I have, in connection with the attorneys of the receiver, petitioned the United States Circuit Court, and obtained an order thereof, authorizing him as such receiver to compromise and sell privately the bad and doubtful assets remaining in his hands, for cash, as it may appear after full investigation, in his judgment, to be to the advantage and best interests of his trust. The balance due upon stock liability, while large in amount, can be realized in part only, and that through compromise settlements, after being placed in judgment. Some two thousand of this amount can be collected without litigation; about ten thousand now involved in pending suits is due from solvent stockholders, and forty-five thousand from the late president, Angus Mackintosh, which latter, it is the opinion of the receiver, can be compromised after judgment for a small percentage.

I did not deem it advisable at this time to include in the general order the exchange of real estate for receiver's certificates, it being my judgment that orders should be obtained in individual cases until the real estate is reduced to possession or control by the termination of foreclosure proceedings, and sale of the real estate included therein, at which time it would appear to be justified, and a saving of court costs and expenses.

The important litigation in the hands of Messrs. Stratton, Lewis & Powell, attorneys for the receiver, is confined to the Denton suit, being the suit to enforce the claim of Angus Mackintosh, \$29,716.00,

fully reported; that against the local stockholders embracing a large number of defendants, and against William H. and Minnie Reeves, the latter to enforce collection of the stock in the name of Minnie Reeves and Ira Bronson. This litigation in the ordinary course can be disposed of during the present quarter, at the end of which time the [104—18] salary of said firm, as provided for in the existing contract, should either be materially reduced, or their services compensated reasonably, when necessary thereafter. It would appear at this time that the expenses of the receivership can be considerably reduced, and I respectfully suggest that the matter be considered in ample time to give said firm of attorneys due notice of such reduction.

The claims in dispute, except that of Ira Bronson, are pending as formerly reported; that of Denton—Angus Mackintosh—\$29,716.00. The First National Bank of Seattle and National Bank of Commerce of Seattle, \$2,196.50 each. The former will be disposed of in pending litigation, and no steps have been taken in the matter of the claims of the banks to enforce them.

I find from an investigation of the status of the indebtedness of Mr. Charles H. Baker to the trust, that proceedings had not been begun by him to adjust the same as heretofore reported. The papers were prepared by his attorney, Mr. J. Hamilton Lewis, of the firm of Stratton, Lewis & Gilman, a short time prior to suspension, but were not filed, owing to the bank's suspension. This indebtedness is represented by a note for the sum of \$10,000.00

given by Baker to the bank on January 9th, 1893, in which it was recited that he had deposited with said bank as collateral security for the payment thereof, '\$10,000.00 in promissory notes of The Rainier Power & Railway Company, and \$20,000.00 first mortgage bonds of said The Rainier Power & Railway Company.' The note also authorizes the bank or anyone authorized to act on its behalf, to sell at private or public sale, with or without notice, at the option of the bank, the whole or any part of said collateral in case of non-performance. Mr. Baker, with the knowledge and consent of said railway company, deposited said notes and bonds. These notes were executed by The Rainier Power & Railway Company by its President D. T. Denny, payable to Chas. H. Baker & Co. and guaranteed by D. T., D. T. Jr. and J. B. Denny, and endorsed by said Chas. H. Baker & Co. Afterwards, on December 16th, 1893, judgment was entered against said railway company and the Dennys upon the said collateral note for the sum of \$10,918.77. I find from an examination of the files and records in this matter, that said Chas. H. Baker & Co. appeared and answered, denying liability as guarantors, and alleging the assignment of the note for collection only, such assignment being by an agreement with the bank; that the Dennys answer and allege the delivery of the bonds of the railway company as collateral to its note to said Baker & Co. at the time of the execution thereof. Judgment is by default against the railway company and the Dennys, and the suit is pending as to said Baker & Co. Execution was

issued upon said judgment and levied upon the said twenty bonds of the railway company aforesaid, and after due notice sold to the bank for the sum of \$125.00, which amount appears credited upon the note of Chas. H. Baker. Thereafter said bonds were exchanged by the bank for twelve \$1,000.00 bonds of the Third Street & Suburban Railroad, a reorganization of said Rainier Power & Railway Company, and the note of Mr. Charles H. Baker charged off. It appears that the said railway company was largely indebted to Baker & Co., and gave to said company its notes, with its bonds as collateral thereto, [105—19] said notes and bonds being thereafter hypothecated by said Baker & Co., and by said Charles H. Baker, separately and together. It is claimed by Mr. Baker that the sale of these bonds as aforesaid was illegal, and is a conversion, and that the bank is liable to him for the full amount of their value at the time of the sale and exchange for Third Street & Suburban bonds, basing the claim upon the ground that it was cumulative collateral, and that the bonds were not pledged as collateral, in the transaction with the bank, to the note of the railroad company; further, that if the sale under said execution could be legally made, that the bank could not in point of law bid in the same as its sale. This position is held by Judge Stratton. I have consulted with Mr. Ira Bronson, the attorney for the bank in the proceedings aforesaid, who contends that the sale as made is legal, and the title to said bonds passed to the bank.

By reason of the extended absence of Mr. Baker in the east and the absence from the city of Seattle of

Mr. Lewis, I have been unable until the present week to obtain any information or action in the premises. A determination of the matter by the courts, cannot now be had, as I am informed, either in the United States Circuit Court or the Superior Court, until December, and in view of that fact, I deem it advisable and respectfully suggest, that action in the premises be postponed until my return to Washington, when I will report further thereon and in detail.

The receiver will follow the provisions of the general order, authorizing him to compromise and sell at private sale the bad and doubtful assets of this trust, and proceed under your instructions to exchange assets for receiver's certificates unless otherwise instructed by you.

Respectfully submitted,

WM. L. SEELEY,

Special Examiner. [106—20]

STATEMENT.

Total amount of claims proved as shown by books		261,972.97
Total liabilities at date of suspension.....		315,358.28
" claims established not shown by the books.		19,227.83
		<hr/> 334,586.11
Less amount dividends paid.....	87,959.36	
" liabilities canceled etc.....	69,862.51	
" R/C 1st Chicago canceled by collateral.....	6,244.15	
" " Park of N. Y. " " " etc.	21,531.50	
" " Seattle Clearing H. " " "	15,553.33	
" " Wells Fargo & Co. " " "	3,953.78	
	<hr/> 205,104.63	129,481.48
Claims in dispute not shown by books:		
Denton-Mackintosh judgment.....		29,716.00
First N. B. Seattle.....		2,196.50
N. B. of Commerce Seattle.....		2,196.50
		<hr/> 163,590.48
Cash in hands Receiver 10/1/97.....	516.30	
Estimate Bills Receivable—cash basis.....	27,500.00	
" other assets " "	35,000.00	
" balance due from stock assessment—cash		
basis	7,500.00	
	<hr/> 65,482.84	
Less estimate expense to close.....	5,000.00	
	<hr/> 60,482.84	

Counsel for plaintiff then offered in evidence a letter from Charles G. Dawes dated April 7, 1898, to Charles H. Baker, Receiver, and the same was admitted and marked Plaintiff's Exhibit 10.

**Plaintiff's Exhibit 10 [Letter, Dated April 7, 1898,
Comptroller of the Currency to Charles H.
Baker, Receiver.]**

TREASURY DEPARTMENT.

Office of

Comptroller of the Currency.

Address Reply to

Comptroller of the Currency.

Washington, April 7, 1898.

Mr. Charles H. Baker,

Receiver, Merchants' National Bank,

Seattle, Wash.

Sir: Referring to the report of Mr. William R. Seeley, Special Examiner, under date of October 9, 1897, he states that it is the judgment of the Receiver and his attorneys, that you as Receiver have full power and authority to compromise and sell the remaining assets of your trust, then remaining your hands; that it is your judgment that you should be authorized to compromise and sell privately, the 'bad and doubtful assets' remaining in your hands, as in your opinion it shall be for the [107—21] interest of the trust.

The Examiner states, that he, in connection with your attorneys petitioned the U. S. Court and obtained an order granting you this power.

You are hereby directed to make a schedule of all the assets which you have compounded and sold under this order from the date of October 1, 1897, to the present time. You will give the name of the purchaser, the character of the asset, and the prices which you have obtained.

You are further instructed that you will hereafter make no sale of assets, under this order, until the proposition has been submitted to the Comptroller.

This office must be kept advised of all compromises proposed and you are required to have the sanction of the Comptroller before presenting your petition to the court for any settlement by compromise.

Upon receipt of this letter you will inform me what settlements you have made since the order was granted and if you have any propositions pending at this time.

Very respectfully,

CHARLES G. DAWES,

Comptroller.

Counsel for plaintiff then offered in evidence the answer of Baker, receiver, to the letter of Charles G. Dawes, which answer bears date April 19, 1898, and the same was admitted in evidence and marked Plaintiff's Exhibit 11.

Plaintiff's Exhibit 11 [Letter, Dated April 19, 1898, Charles H. Baker, Receiver, to Comptroller of the Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Seattle, Wash., April 19th, 1898.

Hon. Charles G. Dawes,
Comptroller of Currency,
Washington, D. C.

Office Comptroller
Apr. 26, 1898,
of Currency.

Dear Sir:—

I am in receipt of your letter of the 7th, revoking the order of your predecessor relative to the com-

pounding and settlement of bad and doubtful assets.

In accordance with your request I enclose herewith a list of the statement made under the previous order and also of negotiations pending along the same line. The latter, if successful, I will in accordance with your instructions submit for your approval.

Yours truly,

CHAS. H. BAKER,
Receiver. [108—22]

Does your order contemplate covering collateral securities? There is a vast lot of these of diverse character. Settlements under this head I did not include in enclosed list, but will make a separate one if desired.

No. 2985.

MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,
Receiver.

Office Comptroller
Apr. 26, 1898,
of Currency.

Seattle, Wash.

List of Assets Compromised by the Receiver of the
Merchants' National Bank of Seattle, Washington
Since Oct. 1st, 1897.

Date.	Kind of Asset.	
Oct. 14, '97.	(Collateral) to Stock & Securities (Doubtful)	\$5876.78
	Okanogan Co. Warrants—Sold to Heller Lyons & Co. of Tacoma Wash. at 75cts.	
" 28, '97.	(Collateral) to Bills Rec. (Doub.) & 13300 & Interest Port Angeles School Warrants. Sold to W. D. Perkins & Co. of Seattle at \$1.05 flat.	
Nov. 27, '97.	Bills Rec. (Good) Compromise with Mark Ten Sue for the payment of the balance of his note of \$300/00 and Inst.—\$5.00.	

- Dec. 19, '97. Bills Rec. (Doubt.) Compromise on J. O. Young's \$400.00 note and Interest & cost—\$114.00 in Inst.
- Jan. 1, '98. Additional Assets (Doubt.) Compromise on C. Allison note of \$1119.65 and Inst. for \$500.00 cash.
- Feb. 28. '98. Bills Rec. (Good) J. M. Boyd et ux. note \$1350.00 Inst. 12% Inst. compromised to 6% upon the prompt payment of the principal, interest and cost amounting in all to \$1609.75.

Compromising of Claims Pending.

Bills Rec. (Doubt.) A. S. Taylor of Everett, Washington, Note \$3000.00; his offer of \$1000.00 has been accepted. See letter of the Comptroller of Oct. 19, 1897.

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Office Comptroller.

Apr. 26, 1898,
of Currency.

Seattle, Wash.

Exchanges Made of Real Estate, etc., for Receiver's Certificate [109—23] by Chas. H. Baker, Receiver, Since Oct. 1st, 1897.

Date.	Kind of Asset.	Name.	Amt. of Balance Due on Rec. Certfs.
Nov. 30th, '97.	Real Est. for Rec. Certf., lots 14 & 15 Denny & Hoyt's Addition to Seattle.	Emma J. States....	\$ 601.32
Nov. 30th, '97.	Real Est. for Rec. Certf., 101 Acres of uncleared land in Sec. 8, Township 24, Range 7 East.	E. L. Tapert.....	3167.92
Dec. 1st, '97.	Clallam Co. Warrants for Rec. Certf. \$50.00 in cash.	and W. D. Perkins & Co. Assignee	94.89

Date.	Kind of Asset.	Name.	Amt. of Balance Due on Rec. Certfs.
Dec. 13th, '97.	Real Est. for Rec. Certf. lots 29, 30, 31 & 32 Randell's Addition.	E. Fobes.....	440.18
Feb. 19th, '98.	Real Est. for Rec. Certf. lots 6, 7, & 8 Randell's Addition.	Wash. Lumb. Co...	359.47
Feb. 28th, '98.	Real Est., for Rec. Certf. and \$119.00 in cash— lots 5, 6, & 7 Mackinzie & Dempsey's Addition—	John Swanson	387.87
Mach. 12th, '98.	Real Est. for Rec. Certf. and \$250.00 in cash, lot 11 A. A. Denny's Addition.	Margaret A. Donlan.	1523.90
Mch. 20th, '98.	Real Est. for Rec. Certf. lot 9 Randell's 3d Addition.	John Swanson.....	394.72

All Real Est. exchanged was based upon a valuation of 20% for Rec. Certfs. [110—24]

[Testimony of Francis Rotch, for Plaintiff.]

FRANCIS ROTCH was then called as a witness on behalf of the plaintiff and testified as follows:

That he had lived in the State of Washington for 26 years; was a lumberman by occupation; that he has resided in Seattle for 17 years, having come to Seattle in 1896. He testified that he was acquainted with Sol G. Simpson in his lifetime. That Mr. Simpson was a logger, and that he died in 1906. The witness testified that he had worked for Mr. Simpson, commencing that employment in the fall of 1898 and remained in his employ until Mr. Simpson died. The witness stated that he was first manager of the shingle department of the Simpson Logging Company, and after that he was Mr. Simpson's private secretary and bookkeeper, becoming that in

(Testimony of Francis Rotch.)

1899, and that he had kept the books of Mr. Simpson. The witness testified that he had known the defendant Baker for about the same length of time as he had known Mr. Simpson, and that Baker and Simpson saw each other frequently.

The witness then testified as follows:

“Q. While you were in the employ, in those years, of Mr. Simpson, do you know whether or not, during that time, he had ever had any personal interest in block 430 Seattle tide lands—answer that yes or no—did you learn during those years whether he had any interest in block 430 Seattle tide lands?

A. I am to answer that yes or no?

Q. Yes. A. Yes.

Q. How did you get the information?

A. Well, it is a good many years ago.

Q. I mean how, by letter or by conversation.

A. It was in conversation with Mr. Simpson.

Q. How many conversations did you have with Mr. Simpson about the ownership of block 430, if you recall?

A. I can remember two all right enough.

Q. About when was the first one? [111—25]

A. That was when I paid an installment to Bob Bridges, the Land Commissioner, I think it was in 1900, I should say somewhere about the last of 1900.

Q. State the conversation you had with Mr. Simpson at that time about block 430, to the Court.

Mr. SHANK.—At this time I object to any statements made by Mr. Simpson as irrelevant, immaterial and incompetent and not provable in this manner, and I desire a general exception to the proving

(Testimony of Francis Rotch.)

of any statements of a man after he has been dead for a number of years, seven years, as manifestly unfair and improper and therefore I make this objection.

The COURT.—I will let it go into the record so that you can take the record to the court of appeals.

Q. (Mr. KELLEHER.) State the first conversation, as nearly as you can, Mr. Rotch.

A. Mr. Simpson was turning a great many things over to me, and of course I opened a great deal of his mail, unless it was marked 'personal,' and I came across a notice from the Land Commissioner saying that there was a payment due, an interest payment, on block 430, and so I went to Mr. Simpson and asked him whether I should pay it or not.

Q. What year was this?

A. That was in 1900; the end of 1900. I have refreshed my memory about that. He said, 'Yes,' he said, 'pay that,' he says, 'but that belongs to Charlie Baker,' and then I said, 'Shall I pay it?' and he said, 'Yes, pay it.' And then I paid it and I made the entry of it in my books, and charged Mr. Baker with that payment. And that was all the conversation we had at that time, as I remember it.

Q. Did you have any other conversation with him about block 430? A. Yes, sir.

Q. When was that, to the best of your recollection?

A. Well, I think it was about two years later.

Q. State the substance of that, as nearly as you can.

A. It came up again about two years later, I think

(Testimony of Francis Rotch.)

in 1902, I am not quite certain about that, and Mr. Simpson was hard up in those times; he had a good deal of property, but he did not have much ready money, and we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said, 'Now, can't we get rid of this block 430?'—I thought maybe at that time probably he got it from Baker, or something of the kind. He said, 'No, Mr. Baker put that in my hands [112—26] and I have held it in trust for him right along,' he said, 'We can't dispose of that.' And then we went over some other pieces of property at that time and decided to dispose of some of the Union Addition; and that is all I remember about that, but it impressed it rather indelibly on my mind.

Q. That was the only conversation—you never had a later one that you recall?

A. I cannot recollect any more than that.

Mr. KELLEHER.—That is all.

Cross-examination.

Q. (Mr. SHANK.) Mr. Rotch, when did these conversations—I mean when did you recall that you had these conversations?

A. When did I recall them?

Q. Yes.

A. I think when you and Mr. Kelleher asked me about it, I ran back in my memory and they came up, that is all.

Q. I visited you, didn't I, at one time and I asked you whether you recalled anything that was said or done and you stated that you did not have any recollection of it, didn't you, at that time?

(Testimony of Francis Rotch.)

A. At that time I probably did, because this is the first that it had been brought to my attention.

Q. And this was about three months ago that I called on you and asked you those questions?

A. Three or four months ago, I could not say when.

Q. And since that time you have recalled it and told Mr. Kelleher of the fact?

A. Yes, Mr. Kelleher asked me about it also.

Q. The first statement was made by Mr. Simpson in 1900? A. That was in 1900, yes, sir.

Q. And the second statement was made about two years later? A. Yes, sir, about 1902.

Q. And you have stated all that he said, have you?

A. All that I can remember, Mr. Shank.

Q. When did you recall this after my conference with you—how long afterward did you recall these conversations?

A. I think about a week after I saw you, Mr. Bausman spoke to me and asked me about it and I said Mr. Shank had already asked me about that, and I tried to look up [113—27] some records, or see if I could recall something about that, and I went to what records I had there—merely the ledger 'B,' and I looked it up, and I remembered then of those two conversations I had, when I saw the entries in there, because I remembered the last one especially.

Q. Didn't you tell me at that time, Mr. Rotch, that you didn't have any records?

A. No, I did not—at least you must have misunderstood me if you got that idea.

Q. That you had no records and there was neither

(Testimony of Francis Rotch.)

head nor tail to any of his records that he ever had kept?

A. I think you are mistaken. Of course I had no records in my own possession.

Q. Didn't you also tell me at that time that Mr. Simpson conducted his business in such a very loose manner that you had neither head nor tail to the matter; that he would come in and report to you that he had paid a certain thing out of his pocket?

A. Yes, sir.

Q. And there was no system about his method of keeping books?

A. That is perfectly true—very often he did that.

Q. And you do not recall telling me that you did not have any books at that time?

A. No, I never said that.

Q. I so understood you.

A. No. I am sorry you misunderstood me.

Q. These conversations did not occur to you as having been had until Mr. Bausman called on you?

A. No; I cannot say that they did, because I took no very great interest in it, but I tried to think afterwards about it, and I referred my mind—I let my mind go back one step after another, and I did recall these conversations.

Q. As nearly as you can remember, you have stated all that was said?

A. All that I can remember, yes. I do not remember anything else.

Q. And it was about in the manner in which you have stated it?

A. Along those lines, yes.

(Testimony of Francis Rotch.)

Q. And what was Mr. Simpson's business?
[114—28]

A. Why, Mr. Simpson was a logger; he was president of the Simpson Logging Company and he also was the owner of the White Star Steamship Company.

Q. He was one of the leading loggers, if not the leading logger, on Puget Sound at that time?

A. Yes, sir, he was.

Q. He had large interests scattered all over the Sound; isn't that a fact?

A. Yes, he had interests, yes.

Q. And his transactions reached into the thousands of dollars? A. Yes, sir, a great many.

Q. And his method of handling his business was a very loose, careless method?

A. I would not say that in this way, because every portion of his business took care of itself in that way that the business was handled by his subordinates; for instance, in the steamship company business that was handled by one class of subordinates and the logging business by another and his personal business was handled by himself.

Q. He had been here on the Sound how long?

A. I don't know.

Q. You first became acquainted with him in 1896?

A. 1898.

Q. He was at all times reckoned as a man of sterling integrity and honor? A. You bet he was.

Q. And he was known for his upright and proper dealings? A. Everywhere he was.

Q. Isn't that a fact? A. Yes, sir.

(Testimony of Francis Rotch.)

Q. He was never at any time associated with or connected in any way, directly or indirectly, with any effort to conceal, defraud or otherwise do harm in a business transaction?

A. No, sir, he was not that kind of a man.

Q. Mr. Rotch, he was a very generous man also, was he not? A. He was.

Q. And with his friends he was most generous; isn't that a fact? [115—29] A. That is true.

Q. And when he was generous with a man he practically had no limit to his generosity; isn't that a fact?

A. I don't know what his limit was, but he used to go pretty strong.

Q. Now, in handling matters with his friends, he did not seek to drive bargains with them but always dealt with them on a generous and proper business basis; isn't that a fact?

A. I always found him that way.

Mr. SHANK.—That is all.

Redirect Examination.

Q. (Mr. BAUSMAN.) Just the same, he told you, in substance, that he was carrying that property for Charlie Baker, or words to that effect.

A. Yes, sir.

Q. And that he never had any interest in it?

A. Yes.

Mr. SHANK.—No, he didn't say that.

Mr. BAUSMAN.—He said so now.

Q. Now, Mr. Rotch, in order to explain about these books. When Mr. Shank first called on you you had not looked up the records to refresh your

(Testimony of Francis Rotch.)

memory; isn't that true?

A. I hadn't seen them since I left.

Q. And when you spoke of not having books, you meant you personally didn't have the custody of them? A. No, I had nothing to do with them.

Q. Now, in that one interview you had with me, that was about the time that Charles H. Baker was examined here as a witness.

A. I don't remember.

Q. Well, it was back in October?

A. I didn't know that Mr. Baker was examined.

Q. And whatever books and records are left behind in this matter, are in the possession of Mr. Force, the executor of the estate of Sol. G. Simpson?

A. Yes, sir.

Q. And of Mr. Mark Reed, his son in law?

A. Yes, sir. [116—30]

Q. (Mr. SHANK.) Mr. Rotch, to get at this matter exactly, you mean now to state, as a part of this record, that he told you that he never had any interest in that property—do you mean to say that Mr. Simpson told you in the conversation in 1902 that he never had any interest in this property?

A. That is what he said.

Q. That he, at that time, did not have any interest, or that he never had?

A. I charged it up to Mr. Baker's account.

Q. Did he tell you that he never had had any interest in the property, or that he didn't have an interest at that time in the property?

A. That I could not say; that was a long time ago, and I could not say.

(Testimony of Francis Rotch.)

Q. Well, which way do you want the record to stand? A. I don't care.

Q. You can't say? A. No. [117—31]

Q. You cannot say whether he stated to you that he did not at that time have any interest or that he never had had any interest?

A. It is pretty hard to say, I am sure, whether—but he said, 'I had this trust with Mr. Baker.'

Q. Do you want to state now that so far as your recollection goes you do not recall whether he stated that he had never had any interest or that he did not at that time have an interest?

A. No. My recollection is he said he never had any interest in that property.

Q. You want that to go now of record as his statement to you?

A. Yes, because **that is my recollection.**

Q. And that you are certain about that?

A. Yes.

Q. Why are you so certain about that, particularly?

A. Because I remember—because it just bore out what he said the first time. He said, 'That belongs to Charlie Baker,' that was in 1900.

Q. Yes, that was all right, but suppose Charlie Baker had acquired that property in 1899, wouldn't that same statement be consistent with that fact?

A. I don't know, I am sure I can't tell, Mr. Shank.

Q. Mr. Rotch, is it not consistent with the fact that if Charles Baker had acquired that property in 1899 that Mr. Simpson may have said in 1902 that he did not have any interest in that property at that time.

(Testimony of Francis Rotch.)

A. That Mr. Baker didn't?

Q. That he, Mr. Simpson, didn't.

A. It may have been, surely."

And that the witness, on further examination, did state that he unequivocally stood upon the statement that Simpson in 1902 had said to him that Baker never had any interest in the property. [118—31a]

[Testimony of Lester Turner, for Plaintiff.]

LESTER TURNER was produced as a witness on behalf of the plaintiff and testified that he had lived in Seattle since 1889. That during 1896 and for several years subsequent thereto he had been in the banking business; at first he was cashier and subsequently president of the First National Bank of Seattle, of which Sol G. Simpson was a stockholder and a director. That Simpson and Baker were friendly.

Q. Did you ever have any conversation with Mr. Simpson about tide lands, and especially about those that are under discussion in this case—answer that yes or no. A. Yes.

Q. Will you state the first conversation that you had with him, and the time?

A. I cannot state with accuracy in regard to the time; I know it was after the Klondike excitement began and when things began to revive in Seattle.

Q. The Klondike excitement to which you refer was July, 1897? [119—31b] A. Yes.

Q. And you had the conversation with him after that, did you? A. Yes.

Q. Can you give the exact time?

(Testimony of Lester Turner.)

A. No, I cannot.

Q. Approximately, would you say about what year?

A. I should say 1888 or 1889, or somewhere along there.

Q. You mean 1898-9? A. 1898-9, yes.

Q. Was the name of Charles H. Baker mentioned in that conversation? A. Yes.

Q. State the substance, as best you can recall it, of that conversation.

Mr. SHANK.—It is understood we make the same objection to all this line of questions.

The COURT.—Yes—it is received under the same statement.

A. (By the WITNESS.) The conversation came up in this way. I was talking to Mr. Simpson in regard to tide-land holdings that the bank held—it owned quite a large amount of tide land, and he was a director of the bank and I talked to him about the affairs of the bank, and in that connection I asked him about his own holdings down there. I knew that he held some tide lands, and he told me that a portion of those lands belonged to Charlie Baker, that he was carrying the title for him, to accommodate him. I do not remember anything—

Q. (Interrupting.) That was the substance of it, as nearly as you can recall? A. Yes.

Q. Give the next conversation and the date of that, if there was a next one.

A. Well, I don't know, but it was some time after the first and within a year or two, I do not recall, though.

(Testimony of Lester Turner.)

Q. What was the substance of that conversation, Mr. Turner?

A. I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way, incidentally, to the properties, and I asked him how he came to hold the title to that property that belonged to Baker. Well, he said [120—32] “Baker didn’t want it known that he had taken the property while he was receiver of the bank, and it might not bear investigation,” and he was carrying it for him for that reason.

Cross-examination.

Q. (Mr. SHANK.) The first conversation which you referred to you say was in 1898 or 1899, or thereabouts? A. I think so.

Q. You are not certain as to just which year it was? A. No.

Q. It might have been as late as 1900, might it not?

A. Possibly; I don’t think it was that late, however.

Q. You say probably in 1899.

A. I think it was in 1898 or 1899.

Q. And the conversation at that time was that he was carrying the title for Mr. Baker? A. Yes.

Q. And now the other conversation which took place was a year or two after that. A. I think so.

Q. And at that time he stated that he was still carrying the title for Mr. Baker, or words to that effect.

A. Yes. I think he stated also that he had made him advances on it, or helped him, or assisted him in

(Testimony of Lester Turner.)

carrying it, or something of that kind.

Q. Did he at that time say anything further to you with reference to the details of the matter?

A. I do not recall anything further.

Q. Now, Mr. Simpson was a man who stood high in the community, wasn't he? A. Yes.

Q. His honor and integrity was unimpeachable as a citizen? A. Yes.

Q. And his dealings were likewise unimpeachable?

A. Yes, sir. [121—33]

Q. For honor and integrity? A. Yes, sir.

Q. And he was generally recognized as a dependable, upright citizen? A. He was, yes.

[Testimony of Mark E. Reed, for Plaintiff.]

MARK E. REED was produced as a witness on behalf of the plaintiff and testified that he had been born in the state of Washington. That he was the son in law of Sol. G. Simpson and held a power of attorney from him. That he was likewise acquainted with the defendant Baker. That he was a logger by business, and that he was a member of the board of the State Capital Commission. That he had caused the records and files to be searched for papers and documents bearing upon block 430, and the transaction between Mr. Simpson and Mr. Baker with reference thereto. That his first business with Mr. Baker regarding this block was early in the year 1905. The witness then identified a letter from Baker dated May 9, 1904, and the same was admitted in evidence and marked Plaintiff's Exhibit 12, and reads as follows:

**Plaintiff's Exhibit 12 [Letter, Dated May 9, 1904,
Chas. H. Baker to Mark Reed].**

THE OVERLAND LIMITED

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Every day in the year

via

CHICAGO & NORTH-WESTERN

UNION PACIFIC and SOUTHERN PACIFIC

Railways.

May 9th, '04.

**Mr. Mark Reed,
Seattle.**

Dear Sir:

I had a talk with Mr. Simpson in S. F. about the tide land which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first 2 or 3 payments I made myself. Mr. Simpson's books however will show the status of the account. There is one more payment [122—34] due next March to complete the contract with the state. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson and send same to Chicago, and I will send you from there a form of assignment to execute, together with note for the account, due 1 year after date, which plan Mr. S. consented to and will doubtless advise you to that effect.

I may be away several months and I may have occasion to use the item, or dispose of it, and so I think it had better be put in the shape indicated.

My address will be as below.

Yours very truly,

CHAS. H. BAKER,

Auditorium Annex,

Chicago.

I believe there is an item to my credit also of a certain sum for right of way across the tract sold to the N. P.

Plaintiff's counsel then offered in evidence a letter from Charles H. Baker to the witness dated November 21, 1904, the same being admitted and marked Plaintiff's Exhibit 13, and reads as follows:

Plaintiff's Exhibit 13 [Letter, Dated November 21, 1904, Chas. H. Baker to Mark Reed].

THE STILWELL-BIERCE & SMITH-VAILE
CO.

Dayton, Ohio, Nov. 21, 1904.

Mr. Mark Reed,
Union Block,
Seattle, Wash.

Dear Sir:

I have not yet received statement of payments which Mr. Simpson made upon the Tide Land Block. This, doubtless, has escaped your attention. Will you not forward it to me at your early convenience at 608 Home Insurance Bldg., Chicago, Ill.

Yours truly,

CHAS. H. BAKER. [123—35]

Counsel for plaintiff then offered in evidence a letter dated July 7, 1904, written by Charles H. Baker to Saul G. Simpson, which was admitted and marked Plaintiff's Exhibit 14, and is as follows:

**Plaintiff's Exhibit 14 [Letter, Dated July 7, 1904,
Chas. H. Baker to Saul G. Simpson].**

Chicago, Ill., July 7, 1904.

Mr. Saul G. Simpson,
Union Block,
Seattle, Wash.

Dear Mr. Simpson:

I am sorry that you did not send me declaration of trust concerning tide land lot, which I wrote you about, and which you told me in San Francisco you would attend to. I wanted to use the paper for the purpose of borrowing some money but did not have it.

I will be back in Seattle in two or three weeks. I hope you are much improved in your general health.

Yours very truly,

CHAS. H. BAKER.

Counsel for plaintiff then offered in evidence a letter dated January 31, 1905, from Charles H. Baker to Sol. G. Simpson, which was admitted and marked Plaintiff's Exhibit 15, and is as follows:

**Plaintiff's Exhibit 15 [Letter Dated January 31,
1905, Chas. H. Baker to Sol. G. Simpson].**
**SNOQUALMIE FALLS AND WHITE RIVER
POWER COMPANY.**

In replying to this letter
please refer to these
initials and number—

C. H. B.

Seattle, Washington, Jan. 31, 1905.

Mr. Sol. G. Simpson,
Seattle, Washington.

Dear Sir:

In regard to the tide land block 430 which you have been carrying for me, please make the assignment of contract [124—36] of the same to Algeron S. Norton of Suffern, New York, and this letter will be your authority for so doing. Also assign lease No. 181 to same party.

Very truly yours,

CHAS. H. BAKER.

Counsel for plaintiff then offered in evidence a letter dated August 8, 1905, from Baker to Simpson, and the same was admitted in evidence and marked Plaintiff's Exhibit 16, and reads as follows:

**Plaintiff's Exhibit 16 [Letter, Dated August 8, 1905,
Chas. H. Baker to S. G. Simpson].**

Seattle, Aug. 8th, '05.

Mr. S. G. Simpson,
City.

Dear Sir:

This will authorize you to transfer contract No. 738 covering Block 430 of Seattle Tide Lands, to A. S. Norton.

Yours truly,

CHAS. H. BAKER.

The witness then testified that as a result of these demands by Baker, that he transferred the property to A. S. Norton, whose name was given him by Mr. Baker. The witness further testified that he had sent to the Land Office and had the deed issued, and that on August 8, 1905, he received a letter from E. W. Ross, which was admitted in evidence and marked Plaintiff's Exhibit 17, and reads as follows: [125—37]

**Plaintiff's Exhibit 17 [Letter, Dated August 8, 1905,
E. W. Ross, Commissioner, to Sol. G. Simpson].**

STATE OF WASHINGTON,
Department of Public Lands.
Office of Commissioner,
Olympia, Wash.

E. W. ROSS,	H. P. NILES,
Commissioner.	Assistant Commissioner.
August 8, 1905.	

Mr. Sol. G. Simpson,
Union Block,
Seattle, Washington.

Dear Sir:

Replying to your request by telegraph, to obtain deed on your contract No. 728, Seattle Tide Lands, remit principal \$990.60; interest to August 15, \$86.68; fee for deed \$2.00, total \$1079.28.

You must also inclose the original contract of sale and certificate from the county treasurer that all taxes are paid on this property.

Very truly yours,

E. W. ROSS,
Commissioner.

Mr. H-Mc.

Counsel for plaintiff then offered in evidence a letter dated August 15, 1905, from H. P. Niles, Assistant Commissioner of Public Lands, to the witness, and the same was admitted and marked Plaintiff's Exhibit 18.

Plaintiff's Exhibit 18 [Letter, Dated August 15, 1905, H. P. Niles to M. E. Reed].

STATE OF WASHINGTON,
Department of Public Lands.
Office of Commissioner,
Olympia, Wash.

E. W. ROSS,
Commissioner.

H. P. NILES,
Assistant Commissioner.
August 15, 1905.

Mr. M. E. Reed,
1310 Alaska Building,
Seattle, Washington.

Dear Sir:

This department is in receipt of yours of the 11th inst., enclosing \$1077.28, in final payment for a [126—38] deed on block 430 Seattle Tide Lands, covered by contract No. 728, and standing on our records in the name of S. G. Simpson. The amount remitted pays in full balance of principal and interest on contract. You state, however, that the contract has been assigned to A. S. Norton; it will, therefore, be necessary for you to remit an additional fee of \$2.00 for issuing deed and \$1.00 fee for approval of the assignment.

You must also send us the original contract of sale with said assignment attached thereto and a certifi-

(Testimony of Mark E. Reed.)

cate from the county treasurer of King County, that all taxes are paid on this property.

Very truly yours,

H. P. NILES,

Assistant Commissioner.

Mr. H-Mc.

The witness stated that the defendant Baker furnished him the money to make final payment to the State of Washington, the check being for the sum of \$1,077.55. The witness then testified as follows:

“Q. And in settling up, in all he paid you about how much, in addition to the money to go to the state land office?

A. My recollection is about two thousand dollars.

Q. Over and above this \$1,077?

A. Something like that. There was a lease of the waterway in front of the lots that Mr. Simpson had acquired in his own name, and I insisted that Mr. Baker should take that lease along with the block and pay for the lease. I remember we had some dealings backwards and forwards in arriving at a settlement as to the price of the lease.

Q. You had conversations with Mr. Baker then at the time of this settlement, did you? A. Yes.

Q. Did you receive for this land which you were releasing in 1905 anything else than your advances?

A. No, sir.

Q. And what was the conversation with Mr. Baker about the settlement of those advances?

A. Well, that he must pay the advances that Mr. Simpson had made for the tide-land blocks; whatever he had paid to the state land office and the taxes

(Testimony of Mark E. Reed.)

and six per cent interest on it. [127—39]

Q. It was vacant, unimproved tide land, I understand it? A. Yes, sir.

Q. Did Mr. Baker want to do that?

A. (Continuing former answer.) —and that he should, in addition to that, pay the amount which we should agree on for this tide-land lease, or harbor area lease, which was in front of it.

Q. Known as No. 181?

A. I don't remember the number of it.

Q. In front of block 430? A. Yes.

Q. Then you settled for block 430 by simply reimbursing you— A. Yes.

Q. Did Mr. Baker want to give you money or not?

A. Well, there was some talk about a note.

Q. You would not take his note?

A. No, I insisted on the money.

Q. Because you had no confidence in him?

Mr. SHANK.—I object to that.

A. Well, I wanted the money.

Q. (Mr. BAUSMAN.) What was the reason you would not take his note, Mr. Reed?

A. I wanted money.

Q. You preferred money to Mr. Baker's note—why did you prefer the money?

Mr. SHANK.—That is objected to.

The COURT.—The objection is sustained.

Q. (Mr. BAUSMAN.) Now, did you ever have any conversation with Mr. Simpson about that property? A. Yes.

Q. What is the earliest time you can recollect talking to him about it?

(Testimony of Mark E. Reed.)

A. About the—well, it was in January or as early as—well very soon after the year 1904. At that time I took charge of all of Mr. Simpson's property, and this matter was listed as among the assets.

Q. In 1904 it was listed as one of the assets, and you [128—40] naturally talked then with Mr. Simpson about it, did you? A. Yes.

Q. Was he in ill health? A. Yes.

Q. And departed to California, didn't he?

A. Yes.

Q. Did he go through the general amount of his estate with you? A. Yes.

Q. And he mentioned block 430?

A. Yes, sir.

Q. Whose did he say it was?

A. It belonged to—

Mr. GROSSCUP.—I suggest that that question is leading.

Mr. BAUSMAN.—Under the issues in this case I should not think you would want to keep anything out.

Q. What did he say about block 430?

A. He said 430 belonged to Charles Baker.

Q. Did he convey any impression to you that Mr. Baker had some years before that bought it back?

Mr. SHANK.—I object to that as irrelevant, immaterial and incompetent.

The COURT.—I will sustain the objection as to what impression he conveyed, he can state what he said.

Q. (Mr. BAUSMAN.) What was said about that land, so far as you recollect?

(Testimony of Mark E. Reed.)

A. I do not remember anything, except that in describing that with some other land that he held in trust, he said, 'Now, these West Seattle tide lands belong to Charlie Baker,' that was about it. He said, 'When you are reimbursed for the amount we paid out on it you transfer it.'

Mr. BAUSMAN.—That is all."

On cross-examination the witness identified a letter under date of August 11, 1905, being a letter from the witness [129—41] to the land commissioner, and the same was received in evidence and marked Defendants' Exhibit "A," and reads as follows:

Defendants' Exhibit "A" [Letter, Dated August 11, 1905, M. A. Reed to E. W. Ross].

SIMPSON LOGGING CO.

Room 1310 Alaska Bldg.

16 Union Block.

Seattle, Wash., Aug. 11th, 1905.

Hon. E. W. Ross,

Commissioner of Public Lands,

Olympia, Wash.

Dear Sir:

Enclosed you will find check on the Washington Natl. Bank of Seattle for \$1077.28 being full settlement of principal and interest due on Block 430 Seattle Tide Lands covered by Contract #728 originally issued to S. G. Simpson.

Mr. Simpson has assigned this Contract to A. S. Norton and Mr. Norton will in due time send you copy of assignment and request Deed, paying such

fees as may be due your Office for the execution of the Deed.

Kindly return receipt for this payment to S. G. Simpson, 1310 Alaska Bldg., Seattle.

Respectfully yours,

M. A. REED.

Received

Aug. 12, 1905.

Commsr. Pub. Land.

Another letter was identified from the witness to the land commissioner under date of August 19, 1905, and the same was received in evidence and marked Defendants' Exhibit "B," and reads as follows:
[130—42]

Defendants' Exhibit "B" [Letter, Dated August 19, 1905, M. E. Reed to E. W. Ross].

SIMPSON LOGGING COMPANY.

Shelton, Wash., August 19, 1905.

Hon. E. W. Ross,

Olympia, Washington.

My dear Sir:—

Referring to my letter of the 11th inst., enclosing check for payment of the balance of the principal and interest on tide land Contract No. 728, for block 430 Seattle Tide Lands, as per my telephone message of this date, I have received notice of the protest of the check for \$1077.28 given by Mr. Chas. H. Baker, and now desire that you hold all papers in the case and refuse to recognize the assignment of the contract by S. G. Simpson and wife until this payment with costs is covered. I will take the matter up with Mr. Baker at once.

Trusting you will be able to comply with this request, I remain,

Very respectfully,

M. E. REED,

Attorney in Fact for S. G. Simpson.

Received

Aug. 21, 1905.

Commsr. Pub. Land.

The witness then testified that these letters were in connection with correspondence which he had had with the land commissioner relating to this property. The witness then identified a certain check and a protest notice attached thereto, and the same were received in evidence and marked Defendants' Exhibit "C." The following is a photographic copy of the check and the indorsements thereon: [131—43]

[DEFENDANTS EXHIBIT "C"]

Photographic Copy of Check and Indorsements,
dated Aug. 10 1905. Chas H. Baker to Mark Reed

SEATTLE, WASH. *Aug. 10th* 1905 No. *X*

THE WASHINGTON NATIONAL BANK

PAY TO *Mark Reed* OR ORDER \$ *1077 28*

One thousand seven hundred and seventy eight DOLLARS

Chas H. Baker

Mark Reed

Seal of the City of Seattle

PAY TO THE ORDER OF
CAPITAL NATIONAL BANK
Olympia, Wash.
E. W. ROSS,
Commissioner of Public Lands

Mark Reed

Chas H. Baker

Seal of the City of Seattle

The protest notice showed that the same was on August 10, 1905, protested by the Washington National Bank, United States Depositary, at Seattle, Washington. That the check was signed by Charles H. Baker. That notice of protest was mailed to Charles H. Baker, Seattle; Mark Reed, c/o Capital National Bank, Olympia; E. W. Ross, c/o Capital National Bank, Olympia, and Capital National Bank, Olympia.

The witness then identified another check dated August 8, 1905, for \$2,000, and the same was received in evidence and marked Defendants' Exhibit "D," a copy of which is as follows:

Defendants' Exhibit "D" [Check, Dated August 8, 1905, Drawn by Chas. H. Baker in Favor of Mark Reed].

Seattle, Washington, Aug. 8th, 1905. No.

FIRST NATIONAL BANK
of Seattle.

Pay to Mark Reed or order \$2000.00/ Two thousand 00/100 Dollars.

CHAS. H. BAKER.

(Stamped across face of check:)

RECEIVED PAYMENT

Through Seattle Clearing House.

No. Aug. 14, 1905. 2.

First National Bank.

(Punched:) PAID

(Indorsements:) Mark Reed.

(Testimony of Mark E. Reed.)

(Stamped on back of check:)

RECEIVED PAYMENT

Through Seattle Clearing House.

No. Aug. 12, 1905. 4.

Dexter Horton & Co.

The witness then testified:

“Q. That represents the payment, does it, Mr. Reed, made to you—that two thousand dollars represents the payment made to you by Mr. Baker to cover the advances made by Mr. Simpson on block 430, and the consideration which you agreed upon to be paid for the lease of the harbor area, is that correct?

[133—45]

A. I am not clear as to that—that that was the entire consideration. My recollection now is that the consideration for the transfer of the harbor area lease and what we had paid out on the lease was two thousand dollars. Now, whether that also included the amount that was due Mr. Simpson for his advances on the block I do not know, but Mr. Baker and myself agreed upon a consideration that was to cover the transfer of the harbor area lease, and that was the main question at issue between us at the time.

Q. That was the main question at issue between you at the time, and you agreed upon two thousand dollars as covering that?

A. That is my recollection of it.

Q. And this is the check that was given in consideration of it? A. Yes, sir.

Q. And that had nothing to do with any accounting for what Mr. Simpson had paid out, or otherwise

(Testimony of Mark E. Reed.)

—that you agreed upon as the price for the harbor area. A. That is as I recollect it.

Q. Did this tax check pass through your hands (showing)—it does not seem to have passed through your hands?

A. I do not know anything about that. I would like to explain myself a little further if I can.

Q. You may do so.

A. I am not exactly clear as to the consideration for the two thousand dollars, whether it also included the advances or whether that was the amount we agreed upon at that time for the harbor area. But that was the settlement that we made at that time.

Q. The point is that you agreed upon a lump sum for the sale of the harbor area to Baker or his assigns? A. Yes, sir.

Q. That had nothing to do with any advances Mr. Simpson had made on that account? A. No, sir.

Q. Your contention now was, Mr. Reed, or rather your idea was that Mr. Simpson owned that harbor area and you wanted to sell it in connection with the transfer of the land?

A. I think so, that was what I told Mr. Baker, that he owned the harbor area and I did not propose to transfer the block back to him unless he took the area, because it was no use to us.

Q. Do you not recall that the protesting of the check at Olympia was explained to you by Mr. Baker at that time as a mere error in his account at the bank?

A. Yes, sir, I think he did. I think he said that

(Testimony of Mark E. Reed.)

someone [134—46] was to deposit money there and he expected it would be deposited to cover the check at the time he drew it, and it was not deposited, or something of that kind.

Q. And it was all satisfactorily fixed up?

A. Yes, it was fixed up."

On redirect examination the witness testified:

"Q. (Mr. BAUSMAN.) To refresh your recollection, though, Mr. Reed, in view of what you said to the Court about your not being clear about this harbor area matter, it seems that there were arrears at the land office, and they amounted to \$1,077, and for that Mr. Baker gave a check. You people had been carrying the taxes and the like for years there for Mr. Baker; and there had to be a reimbursement of that, had there not? A. Yes.

Q. Now, then, the harbor area, while you considered it your own, you were instructed by Mr. Simpson, were you not, that that was to go to Baker too in case of a settlement?

Mr. SHANK.—I object to that as leading. I have no objection to his stating what the conversation was.

Mr. BAUSMAN.—State what it was.

A. I do not remember that Mr. Simpson ever gave me any instructions as to the harbor area, and in fact when Mr. Baker brought his letter to me from Mr. Simpson directing me to transfer this property to Mr. Baker, nothing was said of the harbor area and I immediately raised the question, and Mr. Baker and I did not agree, and we had two or three conferences backwards and forwards over it and I insisted

(Testimony of Mark E. Reed.)

that he must take the harbor area. But I do not believe I ever had any instructions from Mr. Simpson as to that. I do not remember that any way.

Q. You recognized that the harbor area without block 430 was practically worthless, didn't you?

A. Yes, sir.

Q. And that when Mr. Baker took back block 430 he should take back the harbor area lease too?

A. Yes, sir, that was the way I insisted.

Q. And then you settled on the gross sum of three thousand odd dollars? A. Yes.

Q. Here is the letter which explains about the checks (showing.) Here is the letter which you received—do you recognize that as a letter from Mr. Baker to you?

A. It is a letter from Charles H. Baker to me, dated [135—47] August 22, 1905."

The letter mentioned was received in evidence, marked Plaintiff's Exhibit 19, and reads as follows:

Plaintiff's Exhibit 19 [Letter, Dated August 22, 1905, Chas. H. Baker to Mark Reed].

HOTEL GRENOBLE,

7th Ave. & 56th Street.

New York.

Frank N. Lord, Jr., Mgr.

Aug. 22, '05.

Mr. Mark Reed,

Seattle.

Dear Sir:

Mr. Hardin wired me that my account in Seattle was insufficient to meet one of the checks I gave you.

I regret that you have been caused any inconvenience and I owe you an apology. I left several checks signed in blank with Mr. Brockett to settle certain matters for me and it seems that these aggregated a higher figure than I anticipated, thus depleting the fund proposed for you. I telegraphed in connection with the matter, which I trust has been straightened out before this.

Yours truly

CHAS. H. BAKER.

[Testimony of John A. Paine, for Plaintiff.]

JOHN A. PAINE, produced as a witness on behalf of the plaintiff, testified that he had lived in Seattle for 33 years, and had been in the real estate business 14 years, and was in the real estate business in 1905. That he is acquainted with block 430 of Seattle Tide Lands, and knew what the market value of it was in August, 1905. The witness stated that at that time the value of it was in the neighborhood of \$80,000. That he regarded it as the best block west of the West Waterway.

On cross-examination the witness testified that there [136—48] was very little sale for tide lands west of the West Waterway until the spring of 1905.

[Testimony of A. W. Frater, for Plaintiff.]

A. W. FRATER, produced as a witness on behalf of the plaintiff, testified that he had lived in Seattle for 16 years. That he had become receiver of the Merchants' National Bank in April, 1899. That Baker turned over the assets about April 18th of that year. The witness testified that he had forwarded his resignation to the comptroller in 1913. The wit-

(Testimony of A. W. Frater.)

ness further testified that he is the presiding judge of King County.

“Q. When you took charge in April, 1899, did you receive from any source whatever any information to the effect that Charles H. Baker, directly or indirectly, claimed any interest in block 430 Seattle tide lands? A. None whatever.

Q. Have you ever known since, until this suit?

A. No, sir, not definitely, or not at all I might answer that. If you will permit me to explain that.

Q. Yes.

A. It was called to my attention a few days ago that I had granted a divorce for Mr. Baker, and I remembered I did that, from his wife, and that in the decree of divorce there was some stock to some tide land somewhere in Seattle that was set aside to her, but I did not know anything about what the stock represented or what the assets of the company was, I had no knowledge of it whatever.

Q. Refreshing your memory, do you mean the Seattle Waterfront realty stock?

A. I knew nothing about it at all.

Q. And you would not know what particular lots or blocks that company owned?

A. Not the slightest idea and I never did have.

Q. From that time to this you never had any information from Mr. Baker, directly or indirectly, or from anybody, that he claimed any interest in block 430 Seattle [137—49] tide lands?

A. Certainly not; I had no occasion to inquire into the matter, and so I never discussed it that I know of.

(Testimony of A. W. Frater.)

Q. You remained the acting receiver from your taking charge in April, 1899, until about what time?

A. The first of July, 1901.

Q. You would occasionally meet Mr. Baker?

A. Very frequently, that is every now and then.

Q. And talk about the affairs of the trust?

A. There was not a great deal—most of the talk I had about the trust was with Mr. Hill rather than Mr. Baker. Mr. Hill had been his bookkeeper.

Q. He stated nothing to you about Mr. Baker—not that I say he knew it—but he said nothing about block 430?

A. I have no recollection of ever having heard anything about it at all.”

The witness then testified that after talking over with Mr. L. C. Gilman the matter of the estate's claim against Baker on the \$10,000 note it was concluded not worth while to begin suit. The witness said that the supposition was that Baker could not pay it. Baker was heavily indebted or was supposed to be and that they would be unable to collect the account.

On cross-examination the witness testified that while he was receiver he had legal business in Providence, R. I., and in New York State. That A. S. Norton, who had been Baker's attorney while receiver, continued to act as the attorney in these eastern matters during his incumbency of that office. The witness then testified that the business matters with Norton were not closed for some months after his appointment as receiver, and that it might have

(Testimony of A. W. Frater.)

been a year or more. That he personally knew of Mr. Norton's handling these matters, and that he had corresponded with him regarding them. The witness then testified that his commission was sent by the Comptroller of the Currency to Baker [138—50] to be delivered to him.

“Q. It was withheld some time.

A. I think—I don't remember exactly—some four or five or six days after I became appointed I called at his office, but I never could see Mr. Baker, and I called on Mr. Hill a number of times; Mr. Wright I had in charge—he was in the office with me at the time and I employed him as bookkeeper.

Q. About that time was there any tide-land contracts that were up for sale, or tide-land deals that were being closed?

A. I discovered that after I got the books, that there was.

Q. And those tide-land deals were closed about that time?

A. They were closed during the interim, after I had received word from the Department—and a letter from the Comptroller of Currency saying that my commission had been sent to Mr. Baker and I would receive the same.

Q. As I understand it, after you received the letter from the comptroller—

A. Notifying me that my commission had been sent to Mr. Baker.

Q. Notifying you that your commission had been sent to Mr. Baker? A. Yes, sir.

(Testimony of A. W. Frater.)

Q. Mr. Baker had in fact closed certain tide-land deals after that.

A. Yes, that was developed as it appeared from the books.

Q. That fact became known to you after you were appointed receiver? A. Yes.

Q. And then within what time was it?

A. Within a day or two—the same day, perhaps.

Q. Did that create any suspicion on your part as to the *bona fides* of the transaction, or the manner in which it had been handled?

A. That alone did not, no, sir.

Q. Did you have anything else which caused your suspicions to be aroused to these tide-land transactions? A. Well, if you want to know, I did, yes.

Q. What were the tide-land transactions?

A. That was some lots that were sold to Hofius & Company, that is my recollection of it. [139—51]

Q. What block were they in, do you recall?

A. I do not recall the block.

Q. Block 431, wasn't it?

A. The record would disclose that—somewheres over on the west side of the West Waterway.

Q. You then did have your suspicions excited as to these transactions, and that was along about the time, or shortly after your appointment as receiver?

A. I can make that very plain—the whole business, and I wish you would let me do so.

Q. You may do it.

A. My attention was called to the fact about the closing of that deal—

(Testimony of A. W. Frater.)

Q. Which deal?

A. The Pigott-Hofius Company, which was closed, as I remember it—now, I am only going on my recollection—my recollection is that this took place on the 15th day of April, 1901, and it was the Hofius transaction, and the last piece of tide land which had been sold by the receiver, and it was the last tide land that was in the receivership, and that was sold, and on the day or the day after that I became receiver my attention was called to that by Mr. Murphy who was in Preston & Gilman's office at the time and he said these tide lands had been sold at a grossly inadequate price for something like three thousand dollars, and if that matter could be set aside that they would bring a much better price, or ought to have brought at least ten thousand dollars, and I says, 'If that is the case I do not know anything about it at all, and I will submit the matter to Mr. Gilman,' and I talked to Mr. Gilman about it and he wanted to know if I knew anything in the matter which would throw any cloud on it, and I told him I did not know anything about it at all until the matter had been called to my attention, and I would submit it to him as attorney for the trust, and he looked it over and he said it was regular, so far as he could see, and that is all there was about it.

Q. Now, then, subsequently the deal was closed with Hofius and Pigott?

A. No, not subsequently—it was closed previous to my becoming receiver.

(Testimony of A. W. Frater.)

Q. Now, the transaction had been entered upon the books by Mr. Baker or his bookkeeper prior to your taking charge?

A. Yes. There was some correction about it afterwards; I don't recall what it was, because as I say, I have lost the correspondence—the correspondence was all cached away, never dreaming it would come up again, and to get [140—52] rid of the nuisance I buried the whole thing, everything in connection with the Merchants' National Bank, and the receivership, except the journal and the ledger, in an old well about thirty-eight feet deep, and I think the top cover would be about nineteen feet underground—I think it filed it up to within about nineteen feet, and then I covered it with earth, in order to get rid of it."

The witness testified that he had been on the Superior Court bench of King County about nine years, and is the only man who has been upon the bench by that name. That the total dividend declared to the depositors of the Merchants' National Bank was 52%.

On redirect examination the witness testified that the transactions with Hofius and Pigott did not affect block 430, which he stated had been sold to Sol. G. Simpson two years before.

The plaintiff then offered in evidence a letter from Charles H. Baker to Charles G. Dawes, Comptroller of the Currency, dated April 21, 1899, which was received in evidence and marked Plaintiff's Exhibit 20, and reads as follows:

**Plaintiff's Exhibit 20 [Letter, Dated April 21, 1899,
Chas. H. Baker to Comptroller of Currency.]**

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Office Comptroller
Apr. 27, 1899
of Currency.

Seattle, Wash., April 21st, 1899.

Hon. Chas. G. Dawes,	Answered
Comptroller of Currency,	May 2, 1899.
Washington, D. C.	Insolvent Bank.

Dear Sir:—

Mr. A. W. Frater, my successor in office, has to-day receipted to me for the assets of this trust and has delivered to me his bond in the sum of \$25000, properly approved by the Superior Court of this County, and I have delivered to him in accordance with your instructions his commission as receiver and your letter of instructions to him in regard to the conduct of the trust.

Yours respectfully,

CHAS. H. BAKER.

P. S.—I mail concurrent herewith the set of schedules comprising the report from the 1st to the 15th of April, which Mr. Frater has tallied and receipted for; which report I also forward. [141—53]

[Statement of Deposition of Algernon S. Norton.]

The plaintiff then read the deposition of ALGERNON S. NORTON taken in New York on April 21,

(Deposition of Algernon S. Norton.)

1913, before a commissioner. Mr. Norton testified that he had known the defendant Baker since the freshman year in college in 1881. That he had lived in the neighborhood of New York ever since he left college. That he had acted as the attorney for Baker while receiver of the Merchants' National Bank of Seattle with reference to some matters in the east, and that he had continued to act in this capacity for A. W. Frater, who succeeded Baker. The witness further testified that he had had some differences with A. W. Frater, receiver, growing out of the amount of fees which he should charge and the method of payment in connection with certain litigation that he was handling and the manner of paying the same.

The witness testified that he had had business relations with Baker as early as 1904 or 5. The witness testified that the matter of the organization of the White River Power Company was discussed by Mr. Baker with him, and that the witness became the president of this company for Mr. Baker.

The witness testified that in 1905 he received an assignment of tide land contract #728 covering block 430 of Seattle Tide Lands from Sol. G. Simpson. That he paid nothing for this, and that he acted in this regard for Charles H. Baker. The witness did not know how this transfer was paid for—the matter being handled entirely by Mr. Baker. The witness further testified that later the deed was issued to him upon the contract, and that nothing was paid by him therefor, this likewise being

(Deposition of Algernon S. Norton.)

handled by Mr. Baker. Prior to having these titles taken in the witness' name, he stated that Mr. Baker had informed him of his intention in this regard, and the witness testified that Mr. Baker gave as his [142—54] reasons why he wanted the property taken in this way was because of Mr. Baker's intention to go to Korea to be absent some years. He did not carry out his intention of going to Korea. He also stated that Mr. Baker was going to sell the property, and to that end was expecting to list it with real estate agents, and he wanted to be in a position so he could make a transfer. The witness further stated that he had had a course of correspondence with reference to these matters with Norwood W. Brockett, who was Mr. Baker's attorney in Seattle. The witness testified that he did not put up the money with which to pay the taxes, but that the same was furnished by Baker and forwarded by the witness.

The witness then testified that on October 3, 1906, he acquired a 2% interest in this property by purchase. The witness further stated that the Seattle Water Front Realty Company was organized in 1907 at Seattle under the laws of Washington with a capital stock of \$250,000, the trustees being George F. Meacham of Seattle, Harry H. Sondheim and Frank Cummings, the last two being connected with the office of the witness. That Mr. Meacham's name was given to the witness by Mr. Baker, and that he first learned of Mr. Meacham through Mr. Baker. The witness testified that as Mr. Baker would hear

(Deposition of Algernon S. Norton.)

from the different real estate agents with whom he would communicate regarding this property that he would bring this correspondence to the witness' office and discuss the matter with him. The witness then testified that when he purchased the undivided 2% interest in this property on October 3, 1906, he took from Mr. Baker a conveyance and an assignment of a 2% interest in the property. That the amount he paid for this was \$1000 in cash, and agreed to render such services as might be necessary in taking charge of the property until it was marketed. The witness testified that at the time he took the title to the property in 1905, he executed a declaration of trust to [143—55] Baker, and that it was while he held this declaration of trust that he made this purchase of the 2% interest in the property.

The witness testified that Mr. Meacham received 4 shares of stock, and Albert H. Beebe one share of stock for incorporating the Seattle Water Front Realty Company. There was also one share issued to Harry H. Sondheim and one share to Frank Cummings, simply to qualify them as trustees—these shares having been indorsed in blank and re-delivered to Mr. Baker.

The witness testified that on April 26, 1907, a certificate for 30 shares of the Seattle Water Front Realty Company was issued to him instead of 75 shares through an error. That at that time the witness owned a 3% interest in the property, he having purchased an additional 1% interest prior to

(Deposition of Algernon S. Norton.)

the incorporation of the company, so that the total interest which the witness owned in the property prior to the incorporation was an undivided 3%. The witness testified that he gave Baker for the additional 1% interest in the property an assignment of a \$2,000 interest in certain claims against the City of New York on which Baker has received up to the present time \$600.

The witness testified that after the incorporation of the Seattle Water Front Realty Company, various stock certificates were issued, most of them to the witness, who indorsed the same and turned them over to Mr. Baker. Five certificates for 50 shares each were issued directly to Mr. Baker. One certificate for 250 shares was issued to the Union Savings & Trust Company of Seattle. The witness testified that on April 30, 1907, in order to correct an error in issuing the proper number of shares to him for his undivided 3% interest, an additional 45 shares were issued to him, making a total issuance to him of 75 shares which represented his [144—56] 3% interest in the property that he had purchased and paid for before the incorporation of the company.

The witness then testified as follows:

That one certificate for 24 shares was originally issued to Charles H. Baker, and through a transfer by him issued to Irene Russell Washburn.

That one certificate for 5 shares was originally issued to Charles H. Baker, and through a transfer by him issued to Irene Hoffman.

(Deposition of Algernon S. Norton.)

That one certificate for 5 shares was originally issued to Charles H. Baker, and through a transfer by him issued to Pauline Hoffman. He believed the Washburn and Hoffman shares to be presents from Baker to those persons.

That one certificate for 5 shares, originally issued to Charles H. Baker, was transferred on his assignment to Clay Hardin, the daughter of Thomas B. Hardin who was formerly Mr. Baker's personal attorney.

That one certificate for 10 shares, originally issued to Charles H. Baker, was transferred on his assignment to May L. Norton, the wife of the witness. That this assignment was taken into account in the adjustment of the bill of the witness for legal services rendered to Mr. Baker.

That one certificate for 5 shares was transferred at the request of Mr. Baker to Louise Buchanan.

That on June 14, 1907, the witness purchased from Mr. Baker 50 shares of the stock, being 2% of the whole. That this was in addition to the undivided 3% interest purchased by the witness prior to the incorporation. That he had adjusted various bills with Mr. Baker for legal services in various matters, and this 2%, amounting to 50 shares, was taken in satisfaction of his bill for services, one item of which amounted to \$2,500 but was adjusted at \$1,250. That [145—57] the settlement was based upon the total valuation of the property of \$125,000. That this 2% interest was in addition to the 3% interest the witness had referred to as having been

(Deposition of Algernon S. Norton.)

purchased prior to the incorporation, and made a total holding of 125 shares, 75 shares of which were issued to him in payment of his 3% interest and 50 shares in liquidation of his bill amounting to \$2,500. The witness testified that when the corporation was formed no money consideration passed for the original issue of 75 shares—that those shares were issued in consideration of his 3% interest. That the money consideration consisting of services amounting to \$2,500 was paid for the 50 shares.

The witness further testified that he sold 5 shares of the 125 shares issued to him to Charles L. Downs for a money consideration.

The witness testified that the balance of the shares were issued to him and the certificates were indorsed by him and delivered to Charles H. Baker.

The witness testified that his present holdings in the company are 120 shares, consisting of the original 125 shares issued to him less the 5 shares sold by him to Charles L. Downs.

The witness testified that at the beginning of the present suit the record holdings were as follows:

George F. Meacham.....	4 shares
Albert H. Beebe.....	1 share
Frank Cummings	1 share
Algernon S. Norton.....	1938 shares
May L. Norton.....	10 shares
Charles H. Baker.....	251 shares
Union Savings & Trust Company.....	250 shares
Clay Hardin	5 shares
Louise Buchanan	5 shares

(Deposition of Algernon S. Norton.)

Irene Hoffman	5 shares
Pauline Hoffman	5 shares
Percival H. Gregory.....	1 share
Irene Russell Washburn.....	24 shares
Charles L. Downs.....	5 shares

[146—58]

The witness testified that the one share issued to Frank Cummings had been transferred to Baker.

The witness testified that of the 1933 shares standing in his name, he personally owns 120 shares and that he is the record holder of 1813 shares for whoever may be the real owner of those 1813 shares, and that he has no knowledge of the ownership, except that he indorsed and delivered them to Mr. Baker.

Plaintiff's counsel then asked the witness the following questions:

Q. Did you ever hear of the Bank of Suffern, New York, the National Bank of Suffern? A. Yes.

Q. Does this corporation owe them any money?
A. No.

The witness testified that the defendant corporation owes Mr. Baker and owes him for money advanced for the payment of taxes and other disbursements. That Mr. Baker had advanced approximately 95%, and the witness had advanced 5%.

The witness further testified that outside of Downs none of the record holders of stock have been officers. That the witness had been president for a number of years. At the corporation meetings the stock was voted in person or by proxy. That the

(Deposition of Algernon S. Norton.)

Union Savings & Trust Company had consulted Mr. Hardin respecting the shares held by it; not as Mr. Baker's lawyer but that Mr. Hardin acted for the Trust Company.

“Q. In making an investment of that kind, had you thought of the title, Mr. Norton, to this property?”

A. Yes. I realized that I had the deed myself from the State, the original patent. [147—59]

Q. You knew that this property had been acquired from the assets of the Merchants' National Bank, did you not? A. No. I did not know that.

Q. How did you suppose that Mr. Simpson had acquired it? Did you know?

A. I never knew. I never asked. I did not really take any interest in it. Of course, I took some interest in the property when I acquired a personal holding in it, but at the time I took title for Mr. Baker I gave very little attention to the matter.”

The witness testified that he did not know that the property had been acquired through the Merchants' National Bank until the commencement of this suit.

“Q. Were you not struck by Mr. Baker's continued secrecy in this business?”

A. I don't think there has been any secrecy.

Q. Have you noticed that he never has permitted his name to be connected with any of the papers connected with this business?

A. That has been true of all the business I ever handled for him—all the companies I handled. No, it did not occur to me. I know when I was in

(Deposition of Algernon S. Norton.)

Seattle I told various people of Mr. Baker's interest, and I think he has told people of his interest, because he has sent people to me in regard to the matter, talked with them about procuring loans on the property and marketing it.

Q. Is this recently?

A. Oh, at various times, extending way back.

Q. He has never had one share of the stock in his name on the books of this company in six years, has he?

A. Oh, yes; there are 251 shares in his name now.

Q. In his name on the record?

A. Yes, in his name on the records.

Q. When was his name put on the record?

A. * * * On July 15, 1907, he became a stockholder of record.

Q. That is, certificates Nos. 28 to 32? A. Yes.

Q. Those certificates are still out, are they?

A. Yes. [148—60]

Q. Now, these other 1800-odd shares are not in his name, and have never been in his name on the records of the company since they were issued, six years ago?

A. Yes, that's right.

* * * * *

Q. Did you ever ask Mr. Baker why he did not have the remainder of his 1800-odd shares transferred into his name on the records?

A. No, the subject was never mentioned between us."

The witness then testified that he obtained the abstract to the property shortly after the deed was

(Deposition of Algernon S. Norton.)

issued from the State at the request of Mr. Baker. That he was not originally an officer of the Seattle Water Front Realty Company. That Mr. Baker had always left the details of handling this company and its affairs to him.

Witness Norton stated that all correspondence with the State Land Office and with Meacham of Seattle was conducted by himself; that he knew of no letters written by Baker to those people; that he himself had written perhaps 50 to 100 to Meacham in the course of a year. All communications passed through his (witness') office. Witness did not mention by name any persons who had approached him in connection with the purchase of the land, and being asked whether any such persons had approached him at a period antedating the last three years, replied: "I haven't anything on which I could base any definite statement." [149—61]

The declaration of trust given by Norton to Baker on August 24, 1906, declares in substance that he holds the title to certain tide lands known as block 430, Seattle Tide Lands, for Charles H. Baker, the deed having been executed by the State of Washington on October 16, 1905, and recorded in book 7, page 161 of Tide Land deeds.

The declaration further recites that Norton holds lease #181, Seattle Tide Lands, which lease was originally issued to S. G. Simpson.

"Q. Mr. Norton, have you any other document between you and Mr. Baker attesting any interest of his in the stock, approximately 1800 shares, which

(Deposition of Algernon S. Norton.)

stands in his name on the corporate records?

* * * * *

A. No; he has the certificates endorsed by me. I never regarded there was any necessity for such paper or I should have prepared it undoubtedly."

[150—61a]

The witness further testified that the books of the company were removed from Seattle immediately after the organization and have been kept in New York under his direction.

The witness further testified that the details at the time of the transfer from the State of Washington were attended to by Norwood W. Brockett of Seattle.

"Q. Are you prepared to say that there was not always around this property a little air of mystery on the part of Mr. Baker? A. Yes.

Q. There was?

A. No, I think there was not.

Q. You think there was no mystery?

A. I might say this: That in all my transactions with Mr. Baker, in his different matters, water power enterprises and other enterprises, that he seemed to be a rather exceptionally reticent man and I would not know about his business myself until there would be some occasion for me to take a hand in it to do something about it, and then I would find out that for a long time, perhaps, he had had an interest in something or been negotiating with something.

* * * * *

Q. Did he explain why he did not take title him-

(Deposition of Algernon S. Norton.)

self and then subsequently convey it to you, if necessary?

A. No, except as I said before, he was contemplating or said he was contemplating—he was all the while talking about going to China and obtaining concessions there in his public utilities enterprises, and that he wanted me to take this title.”

* * * * *

Witness never visited Seattle till 1912. The land is tide land, vacant and unimproved, except in this, that within a year preceding this suit the State began to fill it under the Semple contract, which filling was completed during the suit and lien certificates issued to the contractor for said filling.

On cross-examination the witness testified that his services for Mr. Baker in connection with the Merchants' National Bank were confined entirely to the collection of some eastern collections due to the bank; that he had no personal knowledge of the details of the receivership.

“Q. You may now state to the Examiner what money you have paid out for taxes on this property, giving the dates of payment as shown by the tax receipts to which you may refer to refresh your recollection. [151—62]

A. Now, if I may begin with the earliest—

Q. (Interrupting.) Just give the date of each payment and the amount.

A. About the time I took title to the property Mr. Baker sent to me and asked me to file with the papers the 9 certificates of redemption which I produce here, there being 9 lots in Block 430, numbered from 1 to

(Deposition of Algernon S. Norton.)

9, consecutively, and these certificates of redemption show the payment by Sol. G. Simpson, for the benefit of Mrs. R. C. Fenner, owner of certificate of delinquency, payment being made on the 11th day of August, 1905, of \$73.33 in the case of each of the 9 lots. This receipt is marked 'Paid, August 12, 1905,' or stamped 'Paid, August 12, 1905, Matt H. Gormley, Treasurer, King County, S. M. H.' \$73.33 on each lot. Then sometime prior to July 16, 1906, I signed a check and sent it to the treasurer of King County for—I will say that the amount of the checks and the amount of the receipts are not always the same, because if I let the date pass at which the tax could be paid without interest—when something would call my attention to that, I would send a check in an amount large enough to cover and receive a rebate from the Treasurer, so sometimes my check was a larger amount than the receipt.

Q. Just state how much the treasurer received.

A. The treasurer received on July 16, 1906, \$313.95, being tax for the year 1905. Then, on July 12, 1907—no, on July 17, 1907, he received \$449.28. On this day he sent the bill on two of the lots separately, this payment being made on two bills, one for lots 1 to 7 and the other for lots 8 and 9, the former for \$341.64 and the latter for \$107.64. On May 28, 1908, I paid to the same County Treasurer \$306.92, this latter being for the taxes of 1907, the payment just before testified to being for the year 1906. This payment of May 28, 1908, \$306.92, was for the first half of the tax for the year 1907. The last half was paid on November 30, 1908, \$306.86. I don't remember how it comes

(Deposition of Algernon S. Norton.)

that there is that small difference, but the receipts read in the amounts I am stating. Then, on May 24, 1909, I paid \$420.31 on account of the taxes for the year 1908, and then on November 26, 1909, I paid for the last half of year 1908, \$124.02 and \$296.27. On September 3, 1910, I paid taxes for the year 1909, amounting to \$957.70, \$922.02 being the face of the tax, and \$35.68 being interest. On May 22, 1911, I paid the first half year of the taxes for 1910, being \$389.34, and on December 12, 1911, for the last half year of 1910 I paid \$420.47, \$31.14 of that being for interest. On May 27, 1912, I paid the first half year's taxes for 1911, \$354.08, and on November 30, 1912, Mr. Baker, as I have explained heretofore, while he was in or about Seattle, paid the last half year's taxes for 1911, \$354.07. The receipt that I hold is dated November 30, 1912.

Q. Those receipts show full payment of the taxes on the dates you have mentioned on the entire block?

A. Yes. [152—63]

Q. And the payment was made by you in behalf of the company? A. Yes.

Q. And the receipt showing payment by Simpson covering the delinquency certificates came into your hands and have since been made part of the records of the company?

A. Yes. There are other payments. There is an annual rental payable to the State for the lease, No. 181, involved in this proceeding, that rental amounting to \$37.96 a year. That has been paid for the year 1906. The rental period runs from January 26th of one year to January 26th of the next, and we have

(Deposition of Algernon S. Norton.)

paid for all the years from January 26, 1906, to the present year. I don't know how it happens, but the last receipt for the payment made January 27, 1913, says, 'Lease from February 26, 1913, to February 26, 1914.' All the others run from January 26 to January 26. Then I have also paid a personal property tax. There seems to have been no personal assessment until quite recent years. The first one was paid January 23rd—the only one I have a record of here is January 23, 1912, \$30.55. That was the personal property tax for the year 1910.

Q. On what property?

A. On the assessed valuation of the leasehold, as I understand it.

Q. That is, the leasehold of the harbor area?

A. Yes. This payment of \$30.55 was \$27.14 tax and \$3.37 interest. Then on April 24, 1912, I paid \$25.14, being the personal property tax for the year 1911. Then just lately I forwarded to Mr. Meacham, to pay the tax for the present year, \$90.00. Just how much that tax will turn out to be, with the interest, I don't know. There is some interest. Then I have paid for the annual license fee and penalties—an annual license fee for the corporation since the year of its organization, \$15.00 per year and penalties of \$110—penalties and reinstatement fees. Then I have paid, as I testified this morning, \$300.00.

Q. You did not give the date of the payment of that penalty.

A. These payments have been made from time to time. The date of the payment of the penalties was May 10, 1912. I have paid also for certificate book

(Deposition of Algernon S. Norton.)

and seal and organization expenses to Mr. Meacham, an amount that I am not just clear on now. I do not have receipts for those, and I do not find my checks for the amounts. I have them in an account-book, but I cannot at the moment state just how much, but I would say not to exceed \$50.00 in the aggregate, and also from time to time charges for recording instruments and other small charges that I cannot at the moment give the exact amount of, and I have also paid by disbursements, or a part of my disbursements and my expenses on the trip that I took in the interests of the property of the company last summer, such amount being \$300.00. The \$300.00 was not the entire amount of my expenses. That was the amount I agreed upon with Mr. Baker should be charged to the company.”

[Testimony of Ludwig Frank, for Plaintiff.]

That LUDWIG FRANK, U. S. Deputy Marshal, as witness for plaintiff, testified that he endeavored to serve subpoena for plaintiff on George F. Meacham and returned it “Not found,” Meacham being supposed to be in New York or Chicago, not to return until March 1st. No subpoena was issued for Meacham by the defendants. [153—64]

[Testimony of John W. Schofield, for Plaintiff.]

JOHN W. SCHOFIELD was produced as a witness on behalf of the plaintiff and testified as follows:

That he is the plaintiff in this action. That he is connected at the present time with the office of the Comptroller of the Currency, being a national bank examiner, and in that capacity has served as receiver

(Testimony of John W. Schofield.)

in some fifteen or twenty national banks. He also stated that it is the practice in the Comptroller's Department not to discharge receivers of national banks for the reason that assets have been known to turn up. Then, too, the department did not desire to release bonds of receivers, but that it keeps the receivership alive. The witness further testified that he had not paid dividends in this trust.

On cross-examination the witness testified that it is the custom of the department in taking charge of an insolvent national bank to list all of the assets under three heads, to wit, "Good," "Doubtful," and "Worthless." That immediately after a bank fails all the assets are listed under one of these three heads, and that they remain in this classification even though the actual nature of the assets should be changed. For instance, he testified, anything that was listed under the head of "Good" would remain in that classification even though it became worthless, and *vice versa*.

On redirect examination the witness testified that there might be additional assets discovered, and if so such additional assets were classified under one of these three heads just mentioned. The witness further testified that as receiver of the Merchants' National Bank no funds had come into his hands, and that at the present time he is without funds, and that there are no assets of the bank so far as he knows excepting the claim which he is asserting in this action.

By consent of both parties to the suit, the ledger and journal kept by Receiver Baker, and subsequently by Receiver Frater, were referred to at will.

Some of the items were introduced by the plaintiff and some by the defendants. For completeness they are all embodied at this point in the record as follows:
[154—65]

			213
			(Journal)
		4742 76	4742 76
1/12/97.	Loans. Paid and Other Disb.....	264 80	
	Paid Commissioner of Public Lands for cer-		
	tain Tide Land Contracts: Nos. 427-8-9		
	and 430.		
	All of Block 429	\$664 00 10%	
	" " " 430	1488 payment.	
	Lots 1-8 and 13-20		
	Block 432	472	
	Lots 13-18 Block 444	24	
		<hr/>	
		2648	
	Cash		264 80
1/13/97.	Sundries—		
	Loans. Paid and Other Disb.....	20	
	Paid on Receiver's C/D #551 favor Seattle		
	Clearing House Assn.		
	Collection from Interest on Geo. Brackett		
	note B/D #9564.		
	All Other Expenses.....	25	
	Office Rent for Jan.	V. 240	
	Legal Expenses Paid.....	68 30	
	Paid Murray & Christian % costs of witnesses		
	and stenographer's work to appeal case—		
	Sidney Sewer Pipe & Terra Cotta Works		
	Co. Case		
	Witnesses.....	38.30	
	Stenographers..	30. V. 241	
	Loans. Paid and Other Disb.....	25	
	Paid insurance from 11/3/96 to 11/3/97		
	(Hanford & Stewart) on 1000 00 policy on		
	Hotel & Store at North Bend which we		
	hold as security to Gustin & Tibbetts		
	indebtedness—	V. 242.	
	Cash		138 30
		<hr/>	
		5145 86	5145 86
[155—66]			

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		6879 90	6879 90
3/23/97.	Loans. Paid and Other Disb.....	2 41	
	Paid % Delinquent taxes on Lot 26 B. 21 Lake Ave. Add. to Kirkland. V. 267.		
	Cash		2 41
3/25/97.	Loans. Paid and Other Disb.....	9 55	
	Refunded 1894 tax on Witman Property at Anacortes11.55 V. 268. less Costs.. 2.		
	Lot 9 Blk. 10 Queen Avenue Add. to Ana- cortes V. 268.		
	Cash		9 55
3/30/97.	Loans. Paid and Other Disb.....	228 75	
	Paid on Receiver's C/D #551 favor of Seattle Clearing House Assn. Collection from collaterals: Young Bros. note B/D #9560. 10/15/96 Prin.100. 2/15/97 Prin.100. Int.. 8.75 Int.. 20.		
	Cash		228 75
3/31/97.	Loans. Paid and Other Disb.....	405 15	
	Paid Commissioner of Public Lands State of Wash. % Tide Land Contracts One Tenth of Purchase Price with interest, Second annual payment.		
	Contract #395 38.60 Prin. 14.57 Int.		
		53.17	
	" #396 36.30 Prin. 13.73 Int.		
		50.03	
	" #727 66.40 Prin. 4.78 Int.		
		71.18	
	" #728 148.80 Prin. 10.72 Int.		
		V. 269. 159.52	
	" #729 47.20 Prin. 3.51 Int.		
		50.71	
	" #730 2.40 Prin. .19		
		2.59	
	" #866 16.70 Prin. 1.25 Int.		
		17.95	
	Cash		405 15
[156—67]		7525 76	7525 76

220

		8228 73	8228 73
3/31/97	Additional Assets Good.....	761 55	
	Tide Land Contracts—		
	Nos. 395, 396, 727, 728, 729, 730, 866.		
	First payment on all was.....	\$356.40	
	Second “ “ “ “	405.15	
	Due Stockholders.....		761 55
3/31/97	Cash	411 75	
	Bills Receivable Doubtful.....		411 75
	Cross Undertaking Co. note B/D #8974.		
	Monies collected by Ira Bronson Atty. in		
	1895 from Pendleton Estate claim & al-		
	lowed by him toward his Compromise.		
3/31/97	Cash	795 50	
	Bills Receivable Doubtful.....		660
	Ira D. Bronson et al. B/D #9411.		
	Note sold to Ira Bronson attorney, and		
	allowed by him in his Compromise.		
	Premium Interest Rent etc.....		135 50
	Int. Ira D. Bronson et al. note B/D #9411		
	See memo. above. Int. to 11/27/96		
	reckoned.		
3/31/97	Loans. Paid and Other Disb.....	1207 25	
	Payment of bill to Ira Bronson Attorney.		
	settled by Compromise by order of the		
	Comptroller. (Bronson had a lien on all		
	assets in his hands.)		
	His original Claim was..	1625.00	Fees
		300.	Salary
		<u>1925</u>	
	Less cash from Pendle-		
	ton Estate.....	411.75	\$1513.25
	Cash		1207 25
[157—68]		<u>11404 78</u>	<u>11404 78</u>

[Endorsed]: Case No. 1—Equity. Plaintiff's Exhibit 21. United States District Court, Western Dist. of Washington. Schofield, Recr., vs. Baker et al. Filed Feb. 27, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

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(Journal.)

1897		9889 15	9889 15
Nov. 29	Offset allowed on Premium Int. Rent and Int. B/R good #9577—Sheafe et ux...	2 05	
	Liabilities Cancelled by offset or otherwise		2 05
	Individual deposit (Unclaimed balance) Anna J. Sheafe.		
29	Cash	8000 00	
	Bills Receivable (good).....		8000 00
	B/R #9572 6000.00 and 9577 2000.00		
	C. M. Sheafe et ux—exchanged for Real Estate.		
29	Loans Paid & other disbursements.....	8000 00	
	Cash		8000 00
29	Additional Assets (doubtful).....	8000 00	
	Real Estate, Lots & blks. in Elliott Bay Addn. to West Seattle received from C. M. Sheafe et ux in exchange for B/R. #9572 & 9577.		
	Due Stockholders		8000 00
23	All other Expenses.....	144 05	
	Amt. of bill of W. L. Seeley Special Ex- aminer for services rendered for exam- ination and report upon the affairs of this trust from Aug. 6/97, to date. See letter of Compt. Dated Nov. 13/97.		
	Balance in hands of Comptroller.....		144 05
29	Cash	315 20	
	Additional Assets (good)— Tide land Contracts #727, 116.40, #728, 198.80 sold to S. G. Simpson.....		315 20
[158—69]		34350 45	34350 45

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1898
July 7 13th Quarterly Report Commences Here.

"	"	Cash	200	
"	"	Assessments paid		200
		Abram Baker on % his 75% stockholders' Assessment as Per Contract		
"	13	Cash	15 50	
"	"	Additional assets Good.....		15 50
		This being interest which was omitted in the sale of tide land contracts No. 727 & 728 sold to Sol Simpson but neglected to included at the time of sale.		
"	13	Cash	10 00	
"	"	Bills Rec. Doubt.....		10 00
		Cross Undertaking Co. #8974 paid on % of Rich. Corkson by Minnie Corkson.		
"	13	Cash	100 00	
"	"	Bills Rec. Good.....		100 00
		Young Bros. #9560.		
"	13	Cash	13 44	
"	"	Bills Rec. Good.....		13 44
		Young Bros. #9560 Their 5% Div. C/E.		
"	13	Claims Bond.....	188 11	
		Rec. Certf. #554 Young Bros. Bal. to be Canceled.		
"	"	Individual Deposit.....		188 11
		Bal. Due on Certf. #554 Young Bros.		
[159—70]			329 05	329 05

306				
1899			3025 82	3025 82
April 15	Cash		120 00	
" "	Bills Rec. Doubt.....			120 00
	D. U. Gilman #9506 Being for sale of lots 19 & 20 Blk. 8 Gilmans Ad. to Seattle. See letter Comptroller authoriz- ing this Sale to Mrs. Mary J. Little. A subsequent sale was made by Mrs. Little to a Wm. Stickney and deed was made direct to him by Receiver.			
" 15	Additional Assets Good.....	1000 00		
	All title right & interest in the lots con- tested for by the Receiver in Block 431, Seattle Tide Lands.			
" "	Due Stockholders		1000 00	
	Additional Assets as Above sold to W. D. Hofius & Co. See letter Comptroller.			
" "	Cash	1000 00		
" "	Additional Assets Good.....		1000 00	
	Lots in block 431 as above sold to W. D. Hofius & Co.			
" "	Cash	2000 00		
" "	Additional Assets Good.....		2000 00	
	Sale of Seattle Tide Land Contracts Num- bers 729, 730, 396, 866 & 395 to W. D. Hofius & Co. See letter Comptroller.			
		7145 82		7145 82

1899		7145 82	307 7145 82
April 15	Legal expenses paid.....	50 00	
	J. H. Barnes Atty. for proceedings to Collect judgment of Gustin et al. vs. Jose et al. Cash (in draw) was ad- vanced to him for this purpose Feby. 21st/99. See receipt, Receipt file.		
" "	Cash		50 00
" 15	Bal. in hands Compt.....	3600 00	
	New York draft to E. U. Roberts Treas. U. S. Remittance Compt.		
" "	Cash		3600 00
		<hr/> 10795 82	<hr/> 10795 82
June 4	Additional Assets Good.....	1644 15	
	Blocks 395-396-431-866 and 730 Tide Land Contracts		
	Due Stockholders		1644 15
	Gain on Tide Land Contracts. To Correct Error made by Rec. Baker April 15, 1899. See Letter Comptroller May 28, 1899. [161-72]		

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Good

Additional Assets coming into possession of the Receiver.

6/13/95	Monies collected for Puget Sound N/Bk. Evers awaiting ad- justment of their account	79 50	6/13/95			79 50
"	Same for National Park Bk. N. Y....	105 70	"			105 70
"	Do.	29 87	"			29 87
"	Do.	50 85	"			50 85
"	Do.	19 52	"			19 52
7/3/95	Do.	30	7/3/95			30
"	Monies collected for Ladd & Tilton % Outstanding Drafts	565 20	"			565 20
7/1/95	C. N. Sheafe note...	189 60	7/1/95			189 60
7/6/95	W. R. Thornell note.	725	7/6/95			725
7/6/95	Do.	100	"			100
7/10/95	Credit with First N/Bk. Chicago % Drafts	1212 42	7/10/95			1212 42
"	Credit with Wells Fargo S. F. % Drafts	2253 34	"			2253 34
"	Credit with Nat'l. Park Bk. N. Y. % Drafts	5678 78	"			5678 78
"	C. C. Evers note....	15	7/21/95			15
"	A. G. Lincoln note..	111 35	6-29-01	Cash Loss	352	111 25
"	W. L. Russell note..	1338	6-29-01	Cash Loss	352	1245 00
			12/22-99			8
						85
			6-29-01	Cash Loss	Cash 7-15	5 10
						904 31
"	Sidney Sewer Pipe Co. Note	1083 01	6-4-01			50
			3/21/97			30 —
			3/13/99			30
			4/11-99			18
			7/21-99			39 60
			11/11 "			12
						18 00
						1 00
"	R. Schmidt et al. Note	1000	6-29-01	Cash Loss	351	999
"	4 1/16 Shares Seattle Transfer Co. stock	406 25	6-31-99		312	284 57
"	75 shares Wenatchee Development Co. stock	7500	12/25-98	Loss Compromised		121.88
				Cash		750
			6-10-01	Compromise	340	6750
		22493 39				

		22493 39							
10/14/95	First Natl. Bank of Chicago Credit % Coll. Fry.....	150	10/14/95	Offset Credit First N/Bk. of Chicago.				150	
12/21/95	Credit with Puget Sound N/Bk. of Everett % Coll.....	15 53	5/18/96					15 53	
12/31/95	Fictitious Credit with National Park Bank N. Y. Allowed in their settlement.....	7000	12/31/95					7000	10
1/16/96	Laramie Mayer note.....	100	6-29-01	Cash Loss	352			99 90	
3/9/96	Crawford Howell Judgment Costs	80	3/9/96					80	
3/16/96	Back interest owed by R. A. Lazier	10	3/16/96					10	
3/16/96	Assessment West Seattle E. L. Property	3010 92	6-29-01	Loss	355			3010 92	
3/24/96	Puget Sound N/Bk of Everett Receivers C/D	170 58	5/18/96					170 58	50
			6-29-01	Cash Loss	352			765 28	
			2/5/97					25	
			3/12/97					25	
			6/29/97					9	
			6/1/99					50 00	
			4/24/97					1733	
2/8/96	Seattle Amusement Co. Note..	874 78	6-29-01	Loss	355			21	
2/25/96	Peninsula Rwy. Co. Bond.....	1733							
2/25/96	Peninsula Rwy. Co. Interest Coupons	1860	1/4/96					280	
1/4/96	Cash from Natl. Park to pay 10th assessment on Penin- sula Rwy. Co. Bonds deposited with them as collateral for which claim had been made.	280	3/31/96					2 76	
3/31/96	L. K. Church old recording fees owed bank before sus- pension	2 75	5/19/96					50 63	
5/19/96	Credit with National Park Bank % Rebate Interest J. 181	50 63	10/7/96					2000	
10/7/96	Monies advanced for Wells Fargo & Co. Bk. to protect collaterals	2000	6-29-01	Loss	355			3013 15	
10/7/96	Assessment paid 9/8/96 on W. S. Land Impr. Co. Stock for E. L. & Co.....	3013 15	11/16/96					5	
11/16/96	Legal Costs paid on Jos. Camp- bell notes 5/20/96.....	5	3/25/97					112 05	50
3/25/97	Interest Mary M. Miller Stock Assessment	112 05	6-29-01	Cash Loss	352			140 92	
3/31/97	Monies owed by J. F. Eshel- man & Wm. H. Llewellyn...	141 42	11/29/97	#727 & 728.\$315 20					
3/31/97	Tide Land Contracts Nos. 395, 396, 727, 728, 729, 730, 866.	761 55	7/13-9815 50					
			4/152000 00					
		43864 75						2330 70	
12/31/95	See entry page 122 Journal— The first item listed under Add. Assmts. Good see p. 642 Ledger was less.....	79 50							
	taken out of this account by counter entry.								

The defendants offered in evidence a certified copy of Schedule E of the receiver's report for the quarter ending November, 1897, and the same was received in evidence and marked Defendants' Exhibit "E," and read as follows:

Defendants' Exhibit "E" [Certified Copy of Schedule E of Receiver's Report for Quarter Ending November, 1897].

SCHEDULE E.

TREASURY DEPARTMENT.

Office of the Comptroller of the Currency.

Quarter Ending November, 1897.

COLLECTIONS OF OTHER ASSETS, Acquired Since Suspension, by the Receiver of the Merchants' *Fractional* National Bank of Seattle:

Date.	Description of Assets.	Good.	Doubtful.	Worthless.
1897.	Amount at date of last report....	22548.82	8354.35	
	Sold to S. G. Simpson Tide Land			
	Contracts #727 & 728.....	315.20		
		<hr/> 22864.02	8354.35	

The defendants offered in evidence a certified copy of a letter dated March 22, 1899, from Baker, receiver, to Dawes, Comptroller, and the answer thereto, the same being admitted in evidence and marked Defendants' Exhibit "F," and read as follows:
[164—75]

Defendants' Exhibit "F" [Letter, Dated March 22, 1899, Chas. H. Baker to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Office Comptroller

Mar. 27, 1899,

of Currency.

Seattle, Wash., March 22nd, 1899.

Hon. Chas. G. Dawes,
Comptroller of Currency,
Washington, D. C.

Answered
Mar. 27, 1899.
Insol. Bks.

Dear Sir:

Under a statute of the State the owner of upland real estate is entitled to purchase from the State under a ten year contract certain contiguous tide land such as may be allotted by the state tide land commission. Under this right of upland ownership the trust has made contracts for the purchase of certain tide lands abutting at West Seattle and has made certain payments thereon with the exception of block 431, which has been in contest with other claimants. I have sold, subject to your approval, the trust's interest in block 431 for \$1000 cash. No payments of course have been made to the state as no contract for this has been issued. This is therefore an additional asset and when your Mr. Wing was here no value was set upon it. The other contracts I have sold subject to your approval for \$2000 cash.

Certain payments have been made on them here below set forth, so you will observe that the trust makes a good profit on this transaction. I have not held these properties at any higher figure than the trust's payments upon them, but there has been for several days some speculative interest in the property in question and there were three parties after it all about the same time. I do not know what the basis of the speculation is, but I submit these offers as the best that I could do, which I think highly satisfactory to the interests of the trust. The three contracts proposed to sell additional to the one hereinabove set forth are as follows:

Block 432, paid thereon..	\$234.76	4 annual payments
Block 441, paid thereon..	203.77	“ “ “
Block 442, paid thereon..	191.63	“ “ “

Total..... 630.16

Sale price, \$2000.

Net profit to the trust, \$1369.84.

\$1000 has been paid in escrow by W. D. Hofius & Co., with whom the transaction is made.

Yours respectfully,

CHAS. H. BAKER,

Receiver.

The above list should include the following also:

Block 443 paid thereon.....	76.05
“ 444 “ “	11.89

87.94

**Defendants' Exhibit "F"—Continued [Letter
Dated March 28, 1899, Comptroller of Currency
to Chas. H. Baker].**

B. F. B.

Address Reply to
Comptroller of the Currency,
Washington, D. C.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency,
Washington, D. C., March 28, 1899.

Mr. Chas. H. Baker,
Receiver, Merchants' Nat. Bank,
Seattle, Wash.

Sir: I am in receipt of your letter of the 22nd instant, in which you state that under the Statutes of the State of Washington, the owner of upland real estate is entitled to purchase from the State under a ten year contract certain contiguous tide land such as may be allotted by the State Tide Land Commission; that under this right of upland ownership the trust has made contracts for the purchase of certain tide lands abutting at West Seattle and has made certain payments thereon with the exception of block 431, which has been in contest with other claimants, and that no payments have made to the State as no contract for this land has been issued, and therefore, it is an additional asset upon which you have previously placed no value. You state that you have sold the other contracts, subject to the approval of the Comptroller, for \$2,000 cash, and that certain payments have been made upon

them as shown in your letter. It is noted that these offers are the best you could obtain, and you regard them as 'highly satisfactory to the interests of the trust.' The three contracts proposed to be sold in addition to No. 431 are stated by you as follows:

Block 432, paid thereon \$234.76 4 annual payments.

“ 441, “ 203.77 4 “

“ 442, “ 191.63 4 “

Total, \$630.16

Baker, page 2.

Sale price \$2,000, giving a net profit to the trust of \$1,369.84; and further that \$1,000 has been paid in escrow by W. D. Hofius & Co. with whom the transaction was made. You further state that the above should include the following:

Block 443, paid thereon \$76.05

Block 444, paid thereon 11.89

\$87.94

The transaction as presented by you appears to be for the interests of the trust, and if you and the representative interests of your trust are satisfied that this is for the best interests of the creditors, and the best proposition you can obtain, you are authorized to petition the court for an order to sell upon the terms stated in your letter of the 22nd instant.

Very respectfully,

CHARLES G. DAWES,

Comptroller. [166—77]

The defendants offered in evidence a certified copy of a letter dated March 13, 1899, from Baker, receiver, to Dawes, comptroller, the same being ad-

mitted in evidence and marked Defendants' Exhibit "H," and reads as follows:

Defendants' Exhibit "H" [Letter, Dated March 13, 1899, Chas. H. Baker to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Seattle, Wash., March 13, 1899.

Hon. Charles G. Dawes,
Comptroller of the Currency,
Washington, D. C.

Dear Sir:

I respectfully call your attention to your recent decision whereby a note signed by me, prior to the suspension of the bank, now becomes an asset of the trust. This places me in the embarrassing situation of debtor to my own Trust; and coming as it does under your decision it would seem that any right of off set or defense I may have had will no longer hold. I am further in the unfortunate situation of having no money or property or any means with which to effect a payment or compromise, which is made more embarrassing by the fact that there are several notes of similar magnitude in other banks, signed by myself.

My relationship to the Trust is inconsistent, therefore, and for that reason I tender you my resignation as Receiver.

The proper administration of the Trust, at the present time, should receive all the Receiver's time

and attention in order to do it justice, and this I am unable to give. I believe it impossible to continue the operation of the Trust under the reduced appropriation; which is a further reason why my trust should be vacated, I therefore offer you my resignation, subject to your early convenience and pleasure.

I would state in this connection that Mr. J. B. Hill has been my assistant and is familiar with the diversified interests and items of the Trust in a way that would take a new man several months to become acquainted with, and he would be entirely worthy your consideration as a successor.

I could not have kept him recently, except for his personal regard for me, as the compensation is not adequate for a gentleman of his attainments, and the fact that outside opportunities are becoming very prevalent, however, with the increased compensation which a Receiver would get he would be willing and able to devote all his time to your Trust in a loyal, energetic and efficient manner.

I desire to thank you personally for the uniform courtesy and consideration you have extended to me, and to assure you that from my own stand point the official [167—78] relationship has been as pleasant as possible, and I will consider that I am under obligations to you so that you may at all time that you so desire, command me.

Very respectfully,
(Signed) CHAS. H. BAKER,

Rec'v'r.

Mr. Hill informs me that he was a candidate for Receiver of Columbia Nat'l Bank of Tacoma, and he respectfully refers to his testimonials filed

in your department in Oct., Nov. and Dec. 1896.
[168—79]

The defendants offered in evidence a certified copy of Schedule E of the receiver's report for the quarter ending April 15, 1899, and the same was received in evidence and marked Defendants' Exhibit "I," and reads as follows:

Defendants' Exhibit "I" [Certified Copy of Schedule E of Receiver's Report for Quarter Ending April 15, 1899].

SCHEDULE E.

TREASURY DEPARTMENT,

Office of the Comptroller of the Currency.

Quarter Ending April 15th, 1899.

COLLECTIONS OF OTHER ASSETS, Acquired Since Suspension, by the Receiver of Merchants' National Bank of Seattle.

Date.	Description of Assets.	Good.	Doubtful.	Worthless.
3/31, 1899.	Amount at date of last report..	24097 76	22077 34	29 08
4/11, 1899.	Sidney Sewer Pipe & Terra			
	Cotta Co.'s Note #8681.....	39 60		
" 15th, "	Seattle Tide Lands.....	1000 00		
" " "	Seattle Tide Land Contracts...	2000 00		
		27137 36	22077 34	29 08

Approved

A. W. FRATER, Rec.

The defendant offered in evidence a letter dated December 1, 1897, from Baker, receiver, to James H. Eckels, Comptroller of the Currency, and the same was received in evidence and marked Defendants' Exhibit "J," and reads as follows: [169—80]

Defendants' Exhibit "J" [Letter Dated December 1, 1897, Chas. H. Baker to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Office Comptroller,

Dec. 9, 1897,

of Currency.

Seattle, Wash., Dec. 1st, '97.

Hon. James H. Eckels,
Comptroller of Currency,
Washington.

Dear Sir:

I have the honor to submit herewith my report of the condition of this trust for the quarter ending Nov. 30.

I wired you about two weeks ago that I would be able to remit \$2000, which I did upon the assurance that some more of the Peninsula Ry bonds would be taken but I have been disappointed. I think however this matter will soon be completed and also several large offset transactions.

Very respectfully,

CHAS. H. BAKER,

Receiver.

The attention of the Court was then called to the last entry made in the books of the receiver to the effect that it was of a different handwriting—the witness Frater having testified that this entry was made by his bookkeeper.

**[Statement Re Introduction of Defendants' Exhibit
"R"—Certified Copy of Award by State of
Washington to Merchants' National Bank of
Blocks 429 and 430, etc.]**

The defendants then offered in evidence a certified copy of an award by the State of Washington to the Merchants' National Bank of blocks 429 and 430, the same having been made upon the application of the said national bank and before the receivership, and the same was admitted in evidence and marked Defendants' Exhibit "R." [170—81]

The defendants then offered in evidence a copy of receipts issued by the Commissioner of Public Lands showing the following facts (Received and marked Defendants' Exhibit "S"):

**[Defendants' Exhibit "S"—Copy of Receipts
Issued by Commissioner of Public Lands, etc.]**

On April 27, 1899, S. G. Simpson paid the Commissioner of Public Lands \$27.86 on account of interest on contract #727, and \$62.51 on account of interest on contract #728.

On March 21, 1898, S. G. Simpson paid through his attorney Thomas H. Littell the annual installment of the principal together with the interest upon contracts #727 and #728.

On September 13, 1900, S. G. Simpson paid the Commissioner of Public Lands the interest on tide-land contract #728 amounting to \$64.39.

On September 16, 1901, S. G. Simpson paid the Commissioner of Public Lands on account of interest on tide-land contract #728 the sum of \$62.50.

On August 2, 1902, S. G. Simpson paid to the Commissioner of Public Lands on account of tide-land contract #728 interest amounting to \$62.50.

On September 8, 1903, S. G. Simpson paid the Commissioner of Public Lands on account of tide-land contract #728 interest amounting to \$60.62.

On March 1, 1904, S. G. Simpson paid the Commissioner of Public Lands on account of contract #728 interest amounting to \$59.44.

The defendants then offered in evidence a certified copy of tide-land contracts covering—

Lots 1 to 6 and 11 to 17, inclusive, in Block 441.

Lots 1 to 6 and 11 to 17, inclusive, in Block 442.

Lots 1 to 8 and 13 to 20, inclusive, in block 432.

Lots 13 to 18, inclusive, in block 444.

Lots 3 to 6 and 9 to 11, inclusive, in block 443.

These contracts are identical in form with that covering block 430 except as to the appraised valuation.

These contracts were assigned by Baker, receiver, to W. D. Hofius and William Pigott on April 14, 1899, and approved by the Commissioner of Public Lands for the State of [171—82] Washington on December 14, 1899.

The foregoing tide-land contracts and the assignments thereof were received in evidence and marked Defendants' Exhibit "T."

The defendants then offered in evidence a certified copy of a deed from Sol. G. Simpson and wife under date of March 11, 1903, to the Seattle and San Francisco Railway and Navigation Company conveying, for a consideration of \$1211.20, a right of way 30 feet in width across block 430, and the same was received

in evidence and marked Defendants' Exhibit "U."

The defendants then offered in evidence a certified copy of a deed from A. S. Norton and May L. Norton, his wife, under date of April 25, 1907, conveying block 430 to the Seattle Water Realty Company, and the same was received in evidence and marked Defendants' Exhibit "V."

The defendants then offered in evidence a certified copy of a contract made between the State of Washington and Eugene Semple, the same bearing date October 17, 1893, with a supplemental contract dated October 24, 1894, and the same was received in evidence and marked Defendants' Exhibit "W." This contract is what is commonly known as the "filling contract," made pursuant to an act of the legislature of the State of Washington, approved March 9, 1893, entitled, "An act prescribing the way in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon the tide and shore lands belonging to the State, [172—83] granting rights of way across lands belonging to the State." The tide lands mentioned in the various contracts held by receiver Baker were within the district covered by the Semple contract. For the dredging of these waterways and the filling of these tide-land lots a lien was created upon the property. Block 430 has been filled under this contract, the fill having been completed in the summer of 1913. The total expense of filling, for which certificates have been issued, aggregates \$79,352.76.

The defendants then offered in evidence a certified copy of the findings of fact and conclusions of law and decree in cause #57,534 in the Superior Court

of King County, State of Washington, being the case of Gladys F. Baker vs. Charles H. Baker, and the same was received in evidence and marked Defendants' Exhibit "X." These findings of fact and conclusions of law and decree were entered on September 6, 1907,—the case being one in which A. W. Frater was the presiding judge. The findings recited that, after evidence was introduced, the case was submitted to the Court, and, among other things, the Court found that a written agreement was made between the parties in full settlement and adjustment of all their property rights. The decree recites:

“And it is further ordered, considered, adjudged and decreed that the disposition of the property of the parties to this action, which they have made between themselves, appears to the Court to be and is just and equitable having regard to the respective merits of the parties and to the condition in which they will be left by such decree, and the party through whom the property was acquired and the burdens imposed upon it for the benefit of the children of said parties, and such disposition of said property, together with the settlement and adjustment of the property rights of the parties is hereby approved and confirmed.” [173—84]

The defendants then offered in evidence a copy of the agreement referred to in these findings, the agreement specifying that among other properties referred to were 250 shares of the capital stock of the Seattle Water Front Realty Company of the par value of \$25,000, represented by certificate #34.

This agreement was received in evidence and marked Defendants' Exhibit "A-3."

[Testimony of Herbert S. Upper, for Defendants.]

HERBERT S. UPPER was then produced as a witness on behalf of the defendants and testified that he had resided in Seattle for 25 years, and had been in the real estate business during this entire time. That he was familiar with tide-land values in the city of Seattle. The witness further testified that he was familiar with the tide-land situation in the city of Seattle and vicinity in the years preceding the boom in tide lands which came when the railroads were particularly active in securing terminal facilities. The witness testified that block 430 was about one mile from Pioneer Square. That prior to 1900, the witness stated, he did not know of any tide lands selling west of the West Waterway. That block 430 was way out in the water. That north of this block and around the West Seattle Ferry there were some sales made. The witness testified that the only tide lands in the Seattle Harbor that were filled prior to 1900 were those within about four blocks of the Union Depot situated at Jackson Street and 3d Avenue South. That there were no fills west of 1st Avenue. The witness testified that prior to 1900 tide-land activity was principally along 1st Avenue. That there were some sales south of Spokane Avenue, [174—85] and that Spokane Avenue was fully half a mile south of block 430.

The witness further stated that in 1897 block 430 did not have very much value, and, upon being ques-

(Testimony of Herbert S. Upper.)

tioned as to what he meant by this, he stated that values in that section had not been established. That there had been very little business or demand. That the same condition prevailed in 1899. That these conditions changed principally after the railroad excitement in 1905 or 1906.

On cross-examination the witness testified that he had had a good deal of business in timber lands. That in 1902 he had personally bought lots in blocks 320 and 321. That these were the first lots he was able to readily sell. The witness did not remember whether he had made any purchases prior to this time. That he had other transactions in tide lands in 1902 or 1903. That there were certain lots on 1st Avenue South that he had likewise sold at an earlier date but could not recall just what these were. The witness did not recall any sales having been made west of the West Waterway from 1897 to 1901.

Upon redirect examination the witness testified that if there had been any sales in that vicinity he would have known in a general way of them, and that he did not recall any sales prior to 1900 west of the East Waterway.

[Testimony of George F. Dearborn, for Defendants.]

GEORGE F. DEARBORN was produced as a witness on behalf of the defendants and testified that he had lived in Seattle and been in the real estate business since 1896—that he had made a specialty of tide lands. The witness testified that in 1897, '98 and '99 he did not know of any sales of tide lands [175—86] west of the West Waterway. That his

(Testimony of George F. Dearborn.)

firm dealt principally in tide lands nearer the city, and that in 1897 and '98 by advertising extensively they were able to get rid of a very little tide-land property. That their property in which they sold these lots was on 1st Avenue South in block 329. The witness stated that he did not think there was any market for anything located south of Atlantic Street or west of the East Waterway.

On cross-examination counsel for the plaintiff asked the witness if about 4/5ths of the tide lands in the Seattle Harbor were covered with water in 1899, and the witness stated that a good deal of tide lands were. The witness stated that there might have been sales in that district without his knowledge. The witness stated that while he did not pretend to say that property was not selling in that vicinity in 1899, yet, if there had been any considerable sales of tide lands in that vicinity, by reason of their system of keeping account of property sales he thought they would have known about any sales. That what he meant to state was that their particular interests were east of the West Waterway on account of their shore-land ownership.

The witness stated upon further cross-examination that in 1898 and 1899 that the sales were made upon the contracts from the State—the contracts being delivered and the purchasers assuming the balance of the purchase price.

[Testimony of Joseph B. Hill, for Defendants.]

JOSEPH B. HILL, being produced as a witness on behalf of the defendants, testified as follows:

That he had resided in Seattle for 23 years, and had been acquainted with the defendant Charles H. Baker during the [176—87] entire time. That he became connected with the receivership of the Merchants' National Bank in March or April, 1897, as bookkeeper, having succeeded Harry Meserve in that position. That he was the only bookkeeper the receiver had. That he had entire charge of the books and accounts of the receivership. That after he became connected with the receivership, Mr. Baker took on some outside business, being connected with the Snoqualmie Falls Power Company. This was in the fall of 1897. That after the latter part of 1898 Mr. Baker devoted considerable time to the power company.

Q. Mr. Hill, when you became accountant and bookkeeper for this receivership, did you go over the assets that were in the hands of the receiver?

A. I did.

Q. Among those assets the evidence shows there was considerable tide lands?

A. There was, yes, sir.

Q. Do you recall the tide land that belonged to that trust west of the Seattle Waterway, known generally as embraced in the application that had been made to the State for the purchase of those West Seattle tide lands?

A. I think they were all west of the Seattle Waterway.

(Testimony of Joseph B. Hill.)

Q. Do you recall about how many blocks there were of that tide land?

A. I really cannot, because I always had a printed slip of paper.

Q. Can you refresh your recollection by any document which was used?

(Handing document to witness.)

A. Yes, sir. This was the slip that was gotten out by Mr. Baker, the receiver. This is correct. This is the memorandum gotten up by the receiver.

The paper writing was admitted in evidence and marked Defendants' Exhibit "A-2," and the following is a photograph of said exhibit. [177—88]

[Defendants' Exhibit "A-2."]

REAL ESTATE

Belonging to the

MERCHANTS' NATIONAL BANK

of Seattle, Wash.

For Sale by

CHAS. H. BAKER, RECEIVER,

507 Pioneer Building.

To Creditors of the Merchants' National Bank:

In view of the great difficulty and necessary sacrifice in converting to cash the real estate and other assets of this trust, I have been authorized by the Comptroller to effect exchanges of such assets for outstanding Receiver's certificates with such holders as may be desirous of doing so upon a satisfactory basis.

CHAS. H. BAKER,
Receiver, Seattle, Wash.

[Endorsed]: 1—Equity. Case No. ——. Defendants' Exhibit A-2. United States District Court, Western Dist. of Washington. Schofield, Rec., vs. Baker et al. Filed Feb. 27, 1914. Frank L. Crosby, Clerk. By S. E. Leitet, Deputy. [178—89]

REAL ESTATE BELONGING TO THE MERCHANTS' NATIONAL BANK.

SEATTLE.

Salmon Bay Park Addition.

All of Block 12.

B. F. Day's First Addition.

Block 3, Lots 1 and 2.

Wallingford's Div. of Green Lake Ad.

Block 9, Lots 2, 3, 4, 5, 6, 7 and 8.

Dearborn's Cable Line Addition.

Block 1, Lots 3 and 4.

Palatine Hill Addition.

Block 2, Lots 11, 12, 13, 14, 15, 16 and 19.

Block 3, Lot 18.

Block 4, Lots 11, 12, 13, 14 and 15.

Block 5, Lots 2, 13 and 14.

Block 6, Lots 10, 11, 12, 13, 14, 15 and 16.

Block 7, Lots 5, 6, 10, 11 and 15.

Block 9, Lots 1, 2, 3, 8, 9, 10, 11, 12, 13 and 14.

Block 11, Lots 2, 6, 7, 11, 12, 13, 14, 15 and 20.

Block 12, Lots 1, 2, 3, 4, 5, 6, 7 and 8.

Block 13, Lots 8 and 9.

A. A. Denny's Addition.

Block 47, Lots 10 and 11.

Terry's Second Addition.

Block 91, Lot 5.

Burke's Second Addition.

Block 30, Lots 3, 4, 5 and 6.

Gilman's Addition (First Subdivision).

Block 1, Lots 9, 10, 11 and 12.

Block 2, Lots 5, 6, 7 and 8.

Block 3, Lots 1, 2, 3, 18 and 19.

Block 4, Lots 5, 6, 7, 8, 21, 22, 23 and 24.

Block 5, Lots 1 and 2.

Block 7, Lots 5, 6, 7, 8, 21, 22, 23 and 24.

Block 8, Lots 1, 2, 3, 4, 5, 17, 18, 19 and 20.

Block 9, Lots 12, 16, 17, 18 and 19.

Hunter's Lake Union Addition.

Block 3, Lots 5 and 6.

Block 8, Lots 4, 5, 6, 7 and 8.

A. A. Denny's Sixth Addition.

Block 40, Lot 6.

Wassom's Ad. to Ravenna Park Ad.

Block 3, Lots 11, 12, 13, 14, 15, 44, 45, 46, 47 and 48.

Wood's South Shore Div. of Green Lake Addition.

Block 45, Lots 1, 2, 3, 4 and 5.

Block 24, Lots 5, 6 and 7.

Block 25, Lot 1.

Day's La Grande Addition.

Block 9, Lots 11 and 12.

Block 8, Lots 17, 18, 19 and 20.

Central Seattle.

Block 14, Lots 9, 11 and 12.

Woodland Park Addition.

Block 64, Lots 2, 3 and 4.

Lake Union Second Addition.

Block 13, Lots 1, 2 and 4.

Rainier Addition.

Block 2, Lots 6 and 7.

Block 3, Lots 1 and 2.

Block 5, Lots 5 and 6.

Block 6, Lots 6 and 7.

Block 7, Lots 5, 6, 7, 8, 9 and 10.

McKenzie & Dempsey Lake Washington Addition.

Block 2, Lots 5, 6, 7 and 8.

Steel Works Addition.

Block 6, Lots 12, 13 and 14.

Block 14, Lots 1, 2, 3, 4 and 5.

“Lindenau” Addition.

All of Blocks 1, 2 and 3.

Block 4, Lots 1, 2, 3, 4, 5 and 6.

Denny & Hoyt’s Addition.

Block 4, Lots 10 and 11.

Block 6, Lots 13 and 14.

Block 8, Lots 21 and 23.

Block 12, Lot 13.

Block 13, Lot 14.

Block 15, Lots 1, 2 and 11.

Block 16, Lots 1, 2, 13 and 14.

Block 20, Lots 14 and 15.

Block 24, Lot 14.

Block 35, Lots 3 and 13.

Block 38, Lots 1 and 2.

Block 41, Lots 1 and 2.

Block 43, Lots 1, 2, 3, 4, 7, 15, 16, 17 and 18.

Block 46, Lots 1, 2, 19 and 20.

Block 48, Lot 25.

Block 51, Lots 22, 23, 24 and 25.

East Seattle.

Block 10, except Lots 11, 12, 25 and 26.

Block 17, Lots 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15
and 16.

Township 23 North, Range 4 East, W. M., SE $\frac{1}{4}$
of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 17.

E $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 2.

N $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 17.

Gilman Park First Addition.

Block 6, Lots 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16,
17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30,
47 and 48.

Block 7, Lots 33, 34, 35, 36, 40, 41, 42, 43, 44, 45,
46, 47 and 48.

Block 8, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13,
14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 45, 46, 47
and 48.

Block 9, Lots 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35,
36, 39, 40, 41, 42, 43, 44 and 45. [179—90]

REAL ESTATE BELONGING TO THE MER-
CHANTS' NATIONAL BANK.

SEATTLE—Continued.

Maple Leaf Addition.

Tract 15, Acre 4, and Lots 1, 2, 3, 4 and 5 in Acre 3.
All of Tract "C."

Tract 35, Acres 2 and 3.

Tract 31, Lots 2, 3 and 4 in Acre 1, and Lot 3 in
Acre 5.

Tract 36, Lots 1, 2 and 3 in Acre 1, and Acres 2, 3,
4 and 5.

Tract 52, Lots 1, 2 and 3 in Acre 1, and Lots 1, 2
and 3 in Acre 2; Lots 1, 2 and 3 in Acre 3; Lots
1, 2 and 3 in Acre 4; Lots 1, 2 and 3 in Acre 5.

Tract 98, Lots 1, 2 and 3 in Acre 1; Lot 4 in Acre 5.

Tract 106, Lots 3 and 4 in Acre 1; Lots 2, 3, 4, 5
and 6 in Acre 2; all of Acre 3, and Lots 1, 2, 5

and 6 in Acre 4; Lots 3 and 4 in Acre 5.

All of Tract 111.

Monroe's Subdivision of Blocks 104 and 105, Maple Leaf Addition.

All of Blocks 1 and 2 and Lots 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 in Block 3; Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 in Block 4.

Randell's Addition.

Block 5, Lots 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 31.

Block 6, Lots 4, 5 and 6.

Block 7, Lots 1, 2 and 3.

Block 8, Lots 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

Block 9, Lots 1, 2, 3 and 4.

Block 18, Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

WEST SEATTLE.

Banner Tract.

Block 4, Lots 24, 25 and 26.

Water-front and Tide Land.

A portion of Lot 2 of Sec. 12, Township 24 North, Range 3 East W. M., containing between 5 and 6 acres.

10.08 acres in Sec. 12, Township 24 North, Range 3 East.

Lots 78, 79 and 80, West Seattle 5-acre tracts, excepting the following parts thereof: Lots 19 to 22 inclusive, Block 1; Lots 2, 12, 13, 14, 15, 16, 17, 22, 23, 24 and 25, Block 2; Lots 10 to 13 and 16 to 26, Block 3; Lots 1 to 19 and Lots 21, 22, 25, 26, 27, 28, 29, 31 and 32, Block 4; and Lots 1,

2, 3 and Lots 17 to 30, Block 5, all in Elliott Bay Addition to West Seattle.

East Side Lake Washington.

Township 25 North, Range 2 East, N $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 35, containing 80 acres.

A tract of land of uniform width off the north side of Lot 2 in Sec. 30, according to Government survey, and containing five acres.

Green Lake Circle.

Five-acre Tracts "C," "F," "K" and "H" and Nos. 45, 52, 61, 62, 81, 104, 105, 106 and 111.

Tract 36, excepting Lots 4, 5 and 6 in Acre 1.

Tract 2, Acre 5.

Tract 16, Acres 1 and 4, and Lots 3, 4, 5 and 6 in Acre 2.

Tract 31, Acre 5, and Lots 2, 3, 4, 5 and 6 in Acre 1.

Tract 35, Acres 2 and 3, and Lots 1, 2, 3, 4 and 5 in Acre 1.

Tract 98, Acre 5, and Lots 1, 2 and 3 in Acre 1.

Tract 97, and Lots 3 and 4 in Acre 2.

Tract 15, Acres 2, 3 and 4, and Lots 2, 3 and 4 in Acre 1.

Seattle Tide Lands.

All of Lots 1 to 6 and 11 to 17 inclusive, Block 442, as shown on Page 51, Vol. 2, Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Lots 1 to 6 and 11 to 17 inclusive, Block 441, as shown on Page 51, Vol. 2, Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the

15th day of March, 1895.

All of Lots 3, 4, 5, 6, 9, 10 and 11, Block 443, as shown on Page 52 of the Map of Seattle Tide Lands, filed with the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Block 429, according to survey thereof, as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Lots 1, 2, 3, 4, 5, 6, 7, 8, 13, 14, 15, 16, 17, 18, 19 and 20, Block 432, according to survey thereof, as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Lots 13 to 18 inclusive, Block 444, according to the survey thereof, as shown on Page 53, Vol. 2 of the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Block 430, according to the survey thereof, as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Wash., on the 15th day of March, 1895.

All of Block 431, according to the survey thereof, as shown on the Map of Seattle Tide Lands.

[180—91]

REAL ESTATE BELONGING TO THE MERCHANTS' NATIONAL BANK.

EDMONDS.

Block 124, Lots 1, 2, 7, 8, 11.

Block 122, Lots 21, 22, 27, 28, 35, 36.

Block 123, Lots 15, 16, 22.

ANACORTES.

Block 18, north 50 feet of Lots 8, 9 and 10.

KIRKLAND.

Lake Avenue Addition.

Block 21, Lots 27 and 28.

FALLS CITY.

160 acres—The N $\frac{1}{2}$ of SE $\frac{1}{4}$ and S $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 8 in Township 24 North, Range 7 East, W. M., excepting that certain portion thereof containing one acre, more or less, which is owned by School District No. 48 of King County.

NEAR ORILLIA.

15 acres in Sec. 33, Township 23 North, Range 4 East.

WATER-FRONT WEST SHORE LAKE WASHINGTON.

Maple Leaf Mill Site.

A portion of Lot 2 in Sec. 34, Township 26 North, Range 4 East, in King County.

MONOHON.

5 acres in the W $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 27, Township 24 North, Range 6 East, W. M.

SIDNEY.

Several good lots.

SNOHOMISH.

E. C. Ferguson's Plat.

Lot 5 in Block 5.

Snohomish City.

160 acres in Lot 1, Sec. 13, Township 28 North, Range 5 East; also the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ and the E $\frac{1}{2}$ of SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 9, Township 28 North, Range 6 East, W. M.

40 acres—The SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 12, Township 26 North, Range 3 East, W. M.

ELLENSBURG.

1 Lot—Commencing at a point 80 feet north of the northeast corner of Block 3 in the original town of Ellensburg, County of Kittitas, and running north 3.71 chains; thence west 3.94 chains; thence south 3.85 chains; thence east 3.24 chains to place of beginning; also fraction "F," First Railroad Addition to Ellensburg.

NORTH DAKOTA.

160 acres—Improved farm near Cavalier.

BALLARD.

F. B. Dibble's Addition.

An undivided $\frac{1}{3}$ interest in all of Blocks 2, 6 and 18.

NORTH BEND.

385 acres—The NE $\frac{1}{4}$ of SW $\frac{1}{4}$ and S $\frac{1}{2}$ of NW $\frac{1}{4}$ and NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 3, Township 23 North, Range 8 East. The SE $\frac{1}{4}$ of NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of NE $\frac{1}{4}$ and W $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 4, Township 23 North, Range 8 East, W. M., excepting 40 acres from the said NE $\frac{1}{4}$ of Sec. 4, said 40 acres consisting of all the land in said NE $\frac{1}{4}$ of said Sec. 4, which lies on

the west side of the south fork of the Snoqualmie River, and all the land in said NE $\frac{1}{4}$ of said Sec. 4 lying west of the east branch of said south fork. Lot 8 and SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 33 and the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 34, Township 24 North, Range 8 East.

SNOQUALMIE.

W. H. Taylor's Plat.

Block 3, Lot 8.

Block 4, Lots 8, 13, 14, 15, 16, 17, 18, 19 and 20.

Block 5, Lots 1, 2, 10, 11, 12 and 21.

Block 9, Lots 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

GILMAN.

Gilman Ranch.

40 acres of SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 29, Township 24 North, Range 6 East.

160 acres of SW $\frac{1}{4}$ of Sec. 29, Township 24 North, Range 6 East.

69 acres, undivided $\frac{1}{4}$ interest in and part of a certain tract of land situated in the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 27, Township 24 North, Range 6 East, and bounded on the south by the county road, on the northwest by the coal branch of the S. L. & E. Ry., and on the northeast by the main line of said railway.

160 acres—The S $\frac{1}{2}$ of NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 29, Township 24 North, Range 6 East.

TACOMA.

Elmwood Addition.

Block 25, Lots 1 and 2.

Block 26, Lots 1 and 2.

(Testimony of Joseph B. Hill.)

NEW TACOMA.

Block 7, Lots 8, 9 and 10.

EVERETT.

Hope Addition.

Block 3, Lots 9, 10, 11, 12, 13, 14, 15 and 16.

Also 35 acres on the prolongation of Grand Avenue.

Near Everett.

82 30/100 acres, Lot 8 and the NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 22, Township 29 North, Range 5 East, according to the Government survey thereof.
[181—92]

Q. You say that was prepared by Mr. Baker?

A. Yes.

Q. With relation to the time that you became accountant in the receiver's office, when was this paper prepared? A. Very shortly after.

Q. You would say, then, the early part of 1897?

A. The early part of 1897. [182—93]

Q. What was done with the copies of these printed papers?

A. They were sent out to different people and used in the office there. I happened to keep this one.

Q. With reference to the creditors of the bank, what was done with them?

A. They were mailed to the creditors.

Q. Now, Mr. Hill, I notice on this paper, on the third page, among the property listed, there are eight pieces of tide land that appear to be located in that locality? A. Yes, sir.

Q. Eight contracts?

(Testimony of Joseph B. Hill.)

A. Eight contracts—eight different blocks.

Q. What effort was made by the receiver, aside from this advertisement, to sell those tide lands and contracts, to your knowledge?

A. Well, they were mailed out to different parties—the assets of the bank.

Q. This circular was mailed?

A. Yes, sir, that circular was mailed.

Q. What other effort did Mr. Baker make, to your knowledge?

A. I do not recall whether they were advertised or not, really.

Q. Do you know whether or not, either by yourself or Mr. Baker, that there was an effort made by solicitation to sell those tide-land contracts by personal solicitation?

A. I do not recall making any myself.

Q. Do you know personally whether Mr. Baker solicited any persons to purchase those tide lands?

A. Not any particular case, but I know that he was anxious to get rid of the assets in a general way, but I cannot recall any particular case.

Q. Now, Mr. Hill, do you remember an inspector or agent or examiner of the Comptroller's Department named Seeley?

A. I do not know him. I do not remember seeing him, but I know there was such a man.

Q. Do you remember any other examiner of the department? A. I do.

Q. Who?

A. Well, I would know the name if I heard it, I

(Testimony of Joseph B. Hill.)

can't think of it now to save my soul. [183—94].

Q. To refresh your recollection, Mr. Hill, do you remember Examiner Wing?

A. Yes, sir, perfectly—I could not think of his name.

Q. Do you remember when Mr. Wing was here?

A. Yes.

Q. About when?

A. Possibly in the fall of 1897, some time after I had been in the office, I do not know the exact date. I would think that would be 1898, because the trust did not last long after 1898.

Q. Did Mr. Wing examine the assets of this bank when he was here? A. He did.

Q. About what length of time did Mr. Wing occupy in the examination of the assets of the bank that were on hand when he was here in 1898?

A. At least two or three days.

Q. In connection with Mr. Wing's examination of those assets did you show him any of the property?

A. I did.

Q. Did you show him any of this tide-land property?

A. I did, and property in West Seattle, too, that we had.

Q. Did you show him generally the real estate that belonged to the bank?

A. Yes, sir, generally the real estate that was left unsold.

Q. Do you know whether or not Mr. Wing made inquiry among any people of Seattle respecting the

(Testimony of Joseph B. Hill.)

property belonging to this bank—do you know whether or not he did?

Mr. KELLEHER.—Do you know of your own knowledge?

A. I do not recall it.

Q. (Mr. GROSSCUP.) Did he examine the books of the trust? A. He did.

Q. Do you know what his purpose was—did he tell you what his purpose was in examining the property of this trust?

A. I cannot recall it. I know it was nearing the end and he wanted to see how long it would take to wind it up—it was nearing the end of the trust.

Q. Mr. Hill, who arranged the sale of blocks 429 and 430 embraced in the tide-land contracts that went to Mr. Simpson?

Mr. KELLEHER.—If he knows. [184—95]

A. Mr. Baker.

Q. (Mr. GROSSCUP.) What was your first connection with that transaction as accountant?

A. When the checks were brought in for settlement and run through the books by me as a cash entry.

Q. That was when whose check was brought in?

A. I can't recall now—Mr. Simpson's, I think.

Q. Mr. Simpson's check? A. Yes, I think so.

Q. And you put the entry through the books?

A. Yes.

Q. Was it you or Mr. Baker that reported it to the department—who made out the report to the department? A. I made out the report.

(Testimony of Joseph B. Hill.)

Q. There has been shown here a report, exhibit 9, now Mr. Hill, how frequently did you make a report to the department? A. Quarterly.

Q. Were those reports made upon forms which were furnished to you by the department?

A. Yes.

Q. And it was the receiver's duty, or his accountant's, to fill out those forms?

A. Yes—they were always passed upon and accepted by the Comptroller.

Q. There has been an exhibit introduced here, Mr. Hill, your quarterly report for November 30, 1897, a photographic copy of that, from which it appears that the first page is a general summary, and then that there are schedules attached to the different classes of property. Was that in the usual form?

A. Yes, sir, that was on the books.

Q. That was the usual form of reporting, was it?

A. Yes, sir; under the different heads.

Q. I call your attention to schedule E of Plaintiff's Exhibit No. 9, and I will ask you to look at schedule E (showing); can you tell from that photographic copy whether that was made by you or not—I mean the written part of it?

A. I can't tell now whether it was or not. [185—96]

The COURT.—You don't know whether that is your writing or not?

A. I wish to state that I am a very poor penman, and those reports were made by a Mr. Tyler, and that is his writing.

(Testimony of Joseph B. Hill.)

Q. (Mr. GROSSCUP.) Do you know whether that is his writing? A. Yes, sir, that is.

Q. Mr. Tyler's?

A. Columbus T. Tyler. It was a very intricate report to make out and I got him to do it and I O.K.'d it.

Q. You got him to do the writing—you employed him to make out these reports?

A. I employed him to make out those reports, and that is his writing.

Q. Was this the usual and ordinary form the reports were made in, as far as you can say?

A. Well, some of them were more elaborate, in fact all of them—yes, sir, they were entered on the different schedules similar to that.

Q. After this transaction in regard to the sales of blocks 430 and 429, to Mr. Simpson, what was the next transaction in those tide lands that you know of, those West Seattle tide lands?

A. They were sold to Mr. Anderson.

Q. Mr. Hill, it is shown here by certain exhibits in evidence that these contracts were assigned to W. D. Hofius & Co. or Hofius and Pigott; as far as you know, who transacted the business in that sale?

A. Mr. Baker.

Q. And with whom?

A. Mr. Anderson, in my presence.

Q. In your presence? A. Yes, sir.

Q. Did you see either Mr. Hofius or Mr. Pigott in that connection? A. I did.

Q. Did you make these entries after that transac-

(Testimony of Joseph B. Hill.)

tion? A. I did.

Q. The entries that relate to these other blocks that went to Hofius and Pigott?

A. Yes. [186—97]

Q. You heard the testimony here about these entries, did you?

A. No. I was turned out—exiled.

Q. Well, Mr. Hill, it is shown that seven blocks were purchased by Hofius and Pigott—the transactions relating to that matter were entered in the books by you? A. Yes.

Q. Do you recall when Mr. Baker left the receivership? A. Yes, sir, it was March or April, 1899.

Q. March or April, 1899?

A. Yes, sir, I think it was the 15th of April he turned the books over to Judge Frater.

Q. Did you leave the receivership at the same time? A. Yes, I did.

A. Yes, I did.

Q. With reference, then, to the time you left the receivership and Mr. Baker left the receivership, when did these transactions by which the West Seattle tide lands, other than the Simpson sale, take place, as far as you know?

A. I didn't quite get that.

Q. When did this negotiation with Anderson begin? A. That was prior to the time we left.

Q. About how long prior to the time that you left the receivership?

A. Oh, a month or two, not over a month or two prior.

(Testimony of Joseph B. Hill.)

Q. Not over. A. No.

Q. How long did that negotiation continue?

A. Not long; a few days. Well, Mr. Baker had to get the consent of the Comptroller—it was also submitted to the Comptroller.

Q. And it was submitted then about the middle of April? A. Yes, or sooner.

Q. Was the matter taken up with the Comptroller?

A. Yes.

Q. Immediately after the transaction was reported?

A. It was taken up with him immediately. It was reported to the Comptroller immediately after the offer was made, for his acceptance, yes. [187—98]

Q. So that the transaction, or the deal took place immediately before the report was made to the Comptroller? A. Yes, sir, I think so.

Mr. BAUSMAN.—I wish to say that what they are talking about now is what is called the Pigott-Hofius sale of the tide lands, and not of block 430 in question.

The COURT.—I understand that from the testimony.

Mr. GROSSCUP.—I was simply connecting the time with reference to the report to the Comptroller.

Q. Between the time of the sale to Mr. Simpson, which appears to have been the latter part of the year 1897, and this sale to Hofius and Pigott in the spring of 1899, what effort was made to your knowledge to sell those tide lands that were purchased by

(Testimony of Joseph B. Hill.)

Hofius and Pigott?

A. The tide lands purchased by Hofius and Pigott?

Q. What efforts were made to sell the remaining tide lands belonging to the trust after the sale to Mr. Simpson?

A. Oh, well, they were advertised and those circulars were gotten out. In fact there was no encouragement to sell anything at that time, but they were advertised.

Q. Mr. Hill, you familiarized yourself with the general market conditions in Seattle in connection with this trust, did you? A. Yes, sir.

Q. Were you under instructions to sell all these remaining assets?

A. At any reasonable price, yes, sir.

Q. Did you make an effort to sell them?

A. I did.

Q. Were there any customers—was there any inquiry at your office for those tide lands prior to a short time before the deal with Hofius & Pigott or with Anderson, which you spoke of?

A. Not at all. We made sales for every application we ever had.

Q. They were the only applications you ever had?

A. Those were the only two.

Q. That is the Simpson and Anderson?

A. The only two chances we ever had to sell anything in the way of tide lands.

Q. In that connection I will ask you did you have applications for other property scattered around the

(Testimony of Joseph B. Hill.)

city and county? [188—99]

A. A very little. There was nothing moving at all.

Q. If men had come to your office with the view of purchasing those tide lands, or had come to the receiver's office for that purpose, would you have likely known of it? A. Yes, sir.

Q. Now, do you know of your own knowledge, Mr. Hill, whether or not those tide lands had any, what you might call a market, any salability in the general market?

A. They had not—they were purely speculative.

Q. (By Mr. GROSSCUP.) Mr. Hill, did you know Sol. G. Simpson in his lifetime?

A. Only by sight.

Q. Just by sight? A. That is all.

Q. You knew Mr. A. H. Anderson?

A. Very well.

Q. And you say it was through Anderson that this deal to Hofius & Pigott was made? A. Yes.

Q. In connection with the taking of office by Mr. Frater did you have anything to do with checking up the account? A. I did.

Q. What length of time was occupied in checking up the accounts with a view to the transfer after Mr. Frater's commission came?

A. It took nearly all day to check up—to check up the accounts of the receiver.

Q. Checking over the assets and making the transfer—how long did it take after Mr. Frater's commission came until the accounts were checked over so

(Testimony of Joseph B. Hill.)

that he could receipt for them?

A. How many days elapsed?

Q. Yes.

A. A very short time; but it took nearly all day to check them up when he did come.

Q. What I was getting at, after Mr. Frater's commission came did you work diligently at that work, checking over the assets of the trust so as to transfer them to Mr. Frater? [189—100]

A. I did, and I got a receipt for them too—I took a receipt.

Q. And you took his receipt for them?

A. I took his receipt for them.

Q. Did this tide-land transaction with Anderson in any way delay the transfer of the assets to Mr. Frater? A. Not at all.

Cross-examination.

Q. (By Mr. KELLEHER.) You say you never knew Sol. G. Simpson in his lifetime?

A. Except by sight.

Q. Never talked with him?

A. Never exchanged a word.

Q. He was never in the office? A. No, sir.

Q. You know nothing about the sale to Simpson—the first you heard of it was after Mr. Baker told you he had sold it and simply asked you to make the entry?

A. Turned in his check and I made the entries.

Q. Do you know whose check it was; whether it was cash or a check, or gold coin, you don't recollect at this time?

A. I think it was Simpson's check.

(Testimony of Joseph B. Hill.)

Q. You think it was, but you don't know?

A. Well, I don't know.

Q. You don't know whether it was a check or cash? A. I am satisfied it was a check.

Q. But whose check it was you don't know?

A. Well, I think it was Simpson's, that is my recollection.

Q. You don't know whether it was Charlie Baker's check, himself?

A. No, it was Simpson's check.

Q. You say you think so?

A. That is my best recollection, yes.

Q. That is all you know about Simpson's sale at all; you knew nothing about it until after it had been accomplished? [190—101]

A. Well, I ran it through the books.

Q. Mr. Baker told you to run the transaction through?

A. The check was brought in and it showed what it was for, and it was run through.

Q. From that time on you stayed after that with the receiver, until April, 1899? A. Yes, sir.

Q. You never heard from Charles H. Baker, or anyone, that Charlie Baker had an interest in Block 430 until about the time this suit was brought, did you, Mr. Hill?

A. Not until some time after the receivership was closed out.

Q. Some time after this present suit was brought—you never heard that Charlie Baker claimed an interest in Block 430 until this suit was brought, a year ago, that is a fact, is it not?

(Testimony of Joseph B. Hill.)

A. Yes.

Q. What is your occupation at the present time?

A. Real estate and loans.

Q. Prior to 1899 you were never in the real estate business—you never were in the real estate business prior to 1900? A. Oh, yes.

Q. You were? A. Yes, about 1898 or 1899.

Q. After you went out? A. Yes, sir.

Q. Not until after you went out of the receivership? A. No.

Q. Previous to that you used to be in a grocery business in Seattle at one time, did you not?

A. That was 1895.

Q. How long did you say you had known Mr. Baker? A. Twenty-three years.

Q. During all that time did you know him pretty well or slightly, or what?

A. Well, he was away for a good many years.
[191—102]

Q. But while he was here you knew him very well? Very intimately?

A. No, not very intimately—not intimately, only after I got associated with him.

Q. Until you went into the office in 1897 you were not very well acquainted with him?

A. I was not intimate; I knew him personally.

Q. You knew him pretty well?

A. I knew him pretty well.

Q. But after you got into the office with him you got very well acquainted with him?

A. I saw him every day, yes.

Q. You saw him every day, and he was a fellow

(Testimony of Joseph B. Hill.)

that, for one reason or another in those days, stayed around with you and talked a good deal with you?

A. He was a man I admired very much.

Q. He was a man you admired very much, and he apparently admired you? A. Yes.

Q. You knew he admired you, and as his successor for appointment to this trust he recommended you to the Comptroller? A. I believe he did.

Q. He was very friendly with you?

A. Now I will take that back. I don't think so. I know that the—

Q. (Interrupting.) He wanted you to be his successor?

A. His successor was appointed before I ever thought of it or heard of it—Judge Frater was appointed before I knew anything about it. I know that he got me the position as bookkeeper, in the office, but I don't remember—

Q. (Interrupting.) You don't remember his writing a letter to the Comptroller—you sat here all the morning and you heard that letter read?

A. I did not—I was exiled.

Q. Well, this forenoon you heard a letter read in which Mr. Baker recommended you to Mr. Dawes as his successor, this morning?

A. I don't think I did, I could not have been here, I guess. [192—103]

Q. Anyway you had a high opinion of him and he had a high opinion of you, apparently? A. Yes.

Q. He talked not only about these affairs, but family affairs with you? A. Yes.

Q. Talked about his children and his wife and his

(Testimony of Joseph B. Hill.)

prospects, and his luck, bad and good? A. Yes.

Q. And you were closely associated in those years, 1897, 1898, and 1899? A. Yes, sir.

Q. Very intimate? A. Yes.

Q. And after that your friendship continued?

A. Yes.

Q. He stayed around here for six years afterwards, until about 1905, coming and going a little, but he stayed here as a resident?

A. Off and on, yes.

Q. And when he would come back he would see you pretty often and you would see him in a friendly manner? A. Always friendly.

Q. Always friendly, and talked freely together in all those years, didn't you, until he finally left here in 1905, or about then? A. I think that is so.

Q. That is a fact, is it not? A. Yes.

Q. Since he gave up his permanent residence here about 1905 he has been back on an average of once or twice a year since then, hasn't he?

A. He has been back on several occasions—I don't know whether it has been as often as that. I don't think he has been back here eight times in eight years, I don't think so.

Q. You went on in a friendly way to him as a witness for him in Chicago this last spring, didn't you?

A. Yes. [193—104]

Q. He saw you there and entertained you there at lunch or dinner? A. I saw him there, yes.

Q. You kept up your intimate acquaintance and friendship for him ever since you have been associated with him, from 1897 to 1899?

(Testimony of Joseph B. Hill.)

A. We always had been friendly, yes. [194—105]

[Testimony of Dr. Alfred Raymond, for Defendants.]

Dr. ALFRED RAYMOND was produced as a witness on behalf of the defendants and testified as follows:

That he is a physician and surgeon by profession, having been in active practice for 27 years, of which 23 years were in Seattle. That he is the attending physician upon A. H. Anderson. That Mr. Anderson had been under his care for about eighteen months. That he is suffering from a high degree of arterio schlerosis. That Mr. Anderson had one very severe spell this fall of angina pectoris which nearly ended his life. That his disease is one of the arteries in which the nutrition of the brain is interfered with, and that interference varies in degree from that which can be very mild to complete softening of the brain. That Mr. Anderson had already lost the sight of one eye from an interocular hemorrhage. That he had attacks of lapses of unconsciousness, in which he may not be obliged to fall, but in some of them he had fallen. That his blood pressure is extremely high. That arterio schlerosis does affect the brain cerebation in a pronounced degree.

In answer to a question as to whether it would be safe to put Mr. Anderson upon the witness-stand, the witness stated that this was a very difficult question to answer as there are some days when Mr. Anderson is very gloomy and melancholy and low-spirited, while other days he is more cheerful. That the par-

(Testimony of Dr. Alfred Raymond.)

ticular mood in which he might be found at the time would be very important. The witness stated that Mr. Anderson's wife, with whom he had several conferences, stated that Mr. Anderson was getting childish. This fact, the witness stated, he likewise had noticed. As to how this trouble would affect his memory, the witness stated that this was pretty hard to gauge or tell. That one would have [195—106] to live with Mr. Anderson to determine this; would have to be constantly with him. The witness further stated that the disease was incurable, and that he did not expect Mr. Anderson to get any better.

On cross-examination, counsel for the plaintiff asked witness if he knew that Mr. Anderson, who was under subpoena, had been in the courtroom during the trial, to which he answered in the negative.

Mr. Grosscup made the following statement to the Court:

Mr. GROSSCUP.—If the Court please, it has been arranged with counsel that without my going on the witness-stand I may make a professional statement, and it will be accepted the same as if under oath.

On Wednesday morning I called on Mr. Anderson in company with Mr. Charles H. Baker for the purpose of ascertaining his knowledge concerning the transactions involved in this case. I had known Mr. Anderson for a considerable period of time. After a little preliminary talk relating to his health, and in a casual way, I asked him if he remembered anything about the West Seattle tide lands. He stated to me that he remembered absolutely nothing about

(Testimony of Dr. Alfred Raymond.)

it. I asked him if he did not remember arranging a sale with Hofius and Piggot. He said he did not; said he did not remember a thing about the West Seattle tide lands; that he did not remember that he had ever been connected with them. I reminded him of some documents here, and what would be the evidence, showing that he had transacted one of these deals. He said he remembered nothing about it. I asked him what he remembered about Mr. Simpson. He said he remembered that there was a Mr. Simpson, but nothing more. [196—107] I asked him where his office was. He said he didn't know—I mean his office and Mr. Simpson's office—I knew they had officed together in those days—and he declared to me an absolute total lack of memory upon the whole subject, and upon the whole time, and of every other incident about which I knew that he was connected in those days. I asked him, among other things, if he had been a director in the Snoqualmie Falls Power Company with Mr. Baker at the time the company was formed in 1898. He said he did not know that he had ever been a director; he did not know that Mr. Simpson had ever been a director. He said he remembered that there was such a company, but he didn't know a thing about it. I happened to know about all those things very well and I made my mind up from talking with him that he had a total lapse of memory.

I make this statement to show why he is not called here as a witness.

Mr. BAUSMAN.—I beg the privilege likewise to make a professional statement.

(Testimony of Dr. Alfred Raymond.)

I have had two conversations with Mr. Anderson respecting this case. One was about a week ago. I spoke to him about Mr. Simpson—this was over the telephone—he called me up to ask whether this case would surely last more than two or three days—he was then under subpoena, and asked me what would be the probable delay; that he was going to Europe on the “Imperator” early in March with a friend of his in this city, Mr. Tucker. I told him that I did not think the case would take more than two or three days. He said he desired to know that because although he would have time to catch the “Imperator,” [197—108] he desired to spend a day or two at his country place before going. He *told he* was not well. I know that he is not well, to be frank about it. I asked him if he knew anything about Mr. Simpson and Mr. Baker with reference to these tide lands. He said he recalled only in a general way that Baker used to be down there at the office where he was with Mr. Simpson, in the Union Block. I said, “Do you remember any transactions between them?” He said, “No, I don’t recall any.” I saw him again in this courthouse here to-day, and he was again asking whether he would be at liberty, in my opinion, to be off. He was not my witness and I told him I could not decide that. He said, “Really, Mr. Bausman, I don’t know anything about this business at all.” I had stated to him in a rough way what the controversy was. He said, “I don’t recall anything about these tide lands except in a very general way, and I could testify to nothing as to Mr. Baker and Mr. Simpson, except that they

(Testimony of Dr. Alfred Raymond.)

were friends, and that is all I know, friends of mine—we were all friends together.” He said, “I cannot recall anything.” And I mentioned to him one of the transactions of this case, the sale in 1897, the alleged sale to Mr. Baker, and also accordingly mentioned to him the alleged repurchase by Baker in 1899 from Simpson, while Baker was still receiver. He said, “Now, if Baker said I was present at any of those things I cannot recall them at all,” and that was all.

Mr. GROSSCUP.—Well, he stated to me that he did not even know that Simpson and Baker had ever had any transactions.

Mr. BAUSMAN.—I am free to say to your Honor, as a conclusion of the matter, that the witness seemed to remember all [198—109] the personages very well, but had no knowledge, as far as he stated, of the events.

The COURT.—Proceed.

[Testimony of E. C. Townsend, for Defendants.]

E. C. TOWNSEND was produced as a witness on behalf of the defendants. This is the same witness as produced by the plaintiff, being the engineer from the office of the Commission of Public Lands at Olympia.

The witness identified a letter from Norwood W. Brockett to the State Land Commissioner dated September 15, 1905, which was received in evidence and marked Defendants' Exhibit “A-4,” and reads as follows:

Defendants' Exhibit "A-4" [Letter, Dated September 15, 1905, Norwood W. Brockett to State Land Commissioner].

SEATTLE-TACOMA POWER COMPANY.

Legal Department.

Seattle, Washington, Sept. 15, 1905.

Thomas B. Hardin,

General Attorney.

Norwood W. Brockett,

Assistant Attorney.

In replying to this letter
please refer to these
initials and number
—N. W. B. Personal.

State Land Commissioner,
Olympia, Washington.

Dear Sir:

I am informed by Mr. A. S. Norton of New York City that he has recently sent you land contract No. 727 covering block 430 of Seattle Tide Lands, duly assigned to A. S. Norton by Sol G. Simpson and Mary M. Simpson, his wife, by Mark E. Reed their attorney.

I desire to inform you that Mr. Reed's power of [199—110] attorney from Sol G. ~~Simpson~~ and Mary M. Simpson has been recorded in Thurston County bearing auditor's number 30883, recorded August 24, 1905, in volume 7 of Misc. records at page 131.

I presume that in issuing the deed to A. S. Norton

you will desire to ascertain Mr. Reed's authority for making the assignment for Simpson and wife which same can be found in the before-mentioned power of attorney. If it is necessary that you have a certified copy of this power of attorney kindly let me know at once in order that I may have the same prepared and delivered to you.

If through any reason Mr. Norton has neglected to enclose the fee for issuing the deed, or if the issuance of the deed is held up for any cause, kindly let me know at once.

Very respectfully,

NORWOOD W. BROCKETT.

Received.

Sep. 18, 1905.

Commsr. Pub. Land.

The witness identified a letter from Norwood W. Brockett to H. P. Niles, Assistant Commissioner of Public Lands, dated September 23, 1905, and the same was received in evidence and marked Defendants' Exhibit "A-5," and reads as follows:

Defendants' Exhibit "A-5" [Letter, Dated September 23, 1905, Norwood W. Brockett to Asst. Commissioner of Public Lands].

SEATTLE TACOMA POWER COMPANY.

Legal Department.

Seattle, Washington, Sept. 23, 1905.

Thomas B. Hardin,

General Attorney,

Norwood W. Brockett,

Assistant Attorney.

In replying to this letter
please refer to these
initials and number
—N. W. B. Personal.

H. P. Niles, Esquire,

Assistant Commissioner of Public Lands,

Olympia, Washington.

Dear Sir:

Your letter of September 21, 1905, enclosing original [200—111] and assignment of contract No. 728, together with the assignment of Harbor Area Lease No. 181, received.

I have communicated with Mr. Norton and will let you know as regards the issuing of the deed as soon as I receive a response from him. I have forwarded to Mr. Norton the assignment of the Harbor Area Lease with instructions that he attach the same to the original, execute a new bond and forward all the instruments to you without delay.

Thanking you for your courtesy in this matter, I remain,

Very truly yours,

NORWOOD W. BROCKETT.

file with cont. Tide Land 728.

The witness' attention was called to the inscription at the bottom of Defendants' Exhibit "A-5," reading "file with cont. Tide Land 728," and he stated that this was put on there by the office of the Land Commissioner.

The witness identified a letter from Norwood W. Brockett to H. P. Niles, Assistant Land Commissioner, under date of October 7, 1905, and the same was received in evidence and marked Defendants' Exhibit "A-6," and reads as follows :

Defendants' Exhibit "A-6" [Letter, Dated October 7, 1905, Norwood W. Brockett to Asst. Commissioner of Public Lands].

SEATTLE TACOMA POWER COMPANY.

Legal Department.

Seattle, Washington, Oct. 7, 1905.

Thomas B. Hardin,

General Attorney.

Norwood W. Brockett,

Assistant Attorney.

In replying to this letter
please refer to these
initials and number
—N. W. B. Personal.

H. P. Niles, Esquire,

Assistant Commissioner of Public Lands,

Olympia, Washington.

Dear Sir:

In accordance with your letter to me of September 21, [201—112] 1905, and my letter to you of September 23, 1905, enclosed you will please find original and assignment of contract No. 728 covering all of block 430 Seattle Tide Lands, upon which I wish you would kindly issue a deed to A. S. Norton, reserving to the Seattle and San Francisco Railway and Navigation Company the easement as set forth in your letter to me of September 21st.

I have communicated with Mr. Norton and he is willing that the deed should issue to him subject to this prior right of way assignment. As soon as the deed is issued kindly forward the same to me.

I have sent on to Mr. Norton Harbor Area lease No. 181 with instructions that he execute a new bond as required by your letter and if you have not already received the same direct from him you will shortly.

Thanking you for your courtesy in this matter, I remain.

Very truly yours,

NORWOOD W. BROCKETT.

Received

Oct. 11, 1905,

Commsr. Pub. Land.

The witness identified a letter from Norwood W. Brockett to H. P. Niles, Assistant Commissioner of Public Lands, under date November 6, 1905, and the same was received in evidence and marked Defendants' Exhibit "A-7," and reads as follows: [202—113]

Defendants' Exhibit "A-7" [Letter Dated November 6, 1905, Norwood W. Brockett to Asst. Commissioner of Public Lands].

SEATTLE TACOMA POWER COMPANY.

Legal Department.

Seattle, Washington, Nov. 6, 1905.

Thomas B. Hardin,

General Attorney.

Norwood W. Brockett,

Assistant Attorney.

In replying to this letter

please refer to these

initials and number

—N. W. B.

Mr. H. P. Niles,

Assistant Commissioner of Public Lands,

Olympia, Washington.

Dear Sir:

In your letter to me of October 11, 1905, I note that you write that the deed to block 430, Seattle Tide Lands, under contract No. 728, had been prepared and was awaiting the Governor's signature. Kindly let me know if the deed has been signed and recorded, and, if so, please forward the same to me.

Very truly yours,

NORWOOD W. BROCKETT.

Received

Nov. 8, 1905,

Commsr. Pub. Land.

The "Received" mark upon these letters the witness stated was placed there by his office.

All the foregoing letters were filed with tide-land contract No. 728.

[Testimony of Charles H. Baker, on His Own Behalf.]

CHARLES H. BAKER, one of the defendants, was produced as a witness on behalf of himself and the other defendants and testified as follows:

That he became a resident of the State of Washington in 1887. That immediately after leaving Cornell University he came to the State of Washington. That from 1887 to [203—114] 1893 he practiced his profession that of civil engineer, and as such he became connected in 1892-93 with the building of an electric light and power station for the Third Street Railroad owned by D. T. Denny and sons. That he was paid for these services in notes of the company, secured by bonds of the company, indorsed by D. T. Denny and sons. That the name of this company was Rainier Power & Railway Company. That he borrowed money and put up these notes and bonds as collateral. That as a result of the panic in 1893, the Denny enterprise failed, the effect of which was to embarrass the witness upon the money which he had borrowed, and as a result thereof about \$60,000 of judgments were obtained against the witness.

That in 1895 he sought to become postmaster of the City of Seattle, and in aid thereof received the indorsement of many people in the city. That after the failure of the Merchants' National Bank in 1895, he became an applicant for the receivership and used the recommendations that were given him for

(Testimony of Charles H. Baker.)

the postmastership to aid him in securing the appointment as receiver. That the Comptroller of the Currency secured these recommendations from the Postoffice Department. That among other numerous recommendations was a letter from Mr. Fred Bausman, one of the attorneys for the plaintiff in this case, which was identified by the witness, received in evidence and marked Defendants' Exhibit "A-8," and reads as follows: [204—115]

Defendants' Exhibit "A-8" [Letter, Dated August 28, 1894, Fred. Bausman to President of the United States].

Frederick Bausman.

Daniel Kelleher.

G. Meade Emory.

BAUSMAN, KELLEHER & EMORY,

Attorneys at Law.

Rooms 626-7-8 Bailey Building.

Seattle, Washington, Aug. 28, 1894.

P. O.

To His Excellency

The President,

Washington, D. C.

P. O. Department.

Received

Sep. 7, 1894.

Office of Chief Clerk.

Sir:

Learning that my friend Charles H. Baker of this City has become an applicant for the place of postmaster at Seattle, I take great pleasure in respectfully adding my recommendation to that of his many

(Testimony of Charles H. Baker.)

friends. Mr. Baker has lived among us for seven years, has been prominently identified with many important business projects, has always been a consistent Democrat and is a man of irreproachable private character. I have not the slightest doubt of his discharging the duties of the place with the highest credit and public satisfaction.

FRED BAUSMAN.

That in 1895 he was appointed receiver of the Merchants' National Bank.

Q. In connection with that receivership you took charge of *of* all of the assets of the bank?

A. I did.

Q. According to the exhibits that have been put in evidence here, Mr. Baker, among the things which came into your possession was an application made by Mr. Mackintosh prior to the failure of the bank, to the State Land Commission for the right to buy certain tide lands at West Seattle, that is shown by the exhibits? A. Yes.

Q. And it is also shown that you asked permission of the Comptroller of the Currency to prosecute those applications? A. Yes.

Q. In the year 1897 to what extent had the assets of this [205—116] bank been collected, say the latter part of the year 1897?

A. I had paid either thirty or forty per cent dividends. The liquid assets had all been disposed of. The assets that were remaining were very slow and it was almost impossible to realize upon them.

Q. Did they consist, in part, of the real estate?

(Testimony of Charles H. Baker.)

A. Very largely of real estate.

Q. Were you visited from time to time by examiners accredited by the Comptroller of the Currency?

A. Yes.

Q. What was the attitude of those examiners, and of the department which you were serving, with reference to the disposition of those remaining assets, with a view to closing up the trust?

A. The judgment of the examiners was that they should be disposed of as soon as they could and the trust wound up.

Q. Now, with reference to the sale of real estate, was there a particular anxiety to get rid of those real estate assets? A. There was.

Q. As a result of that, it has been shown here by the exhibits that an order was procured allowing you to exchange what are designated as receiver's certificates for real estate; do you recall such order?

A. There was such order, yes.

Q. What were those receiver's certificates that are referred to?

A. When a bank first goes into a receiver's hands the liabilities are scheduled and when they are approved the receiver issues his certificates on that claim, which is then popularly known as a receiver's certificate.

Q. In other words, it is the evidence of an approved claim? A. Yes.

Q. Were those issued to depositors and other creditors of the Merchants' National Bank?

A. Everyone who could prove a claim against it.

(Testimony of Charles H. Baker.)

Q. Now, Mr. Baker, I show you Defendants' Exhibit "A-2," which is put in evidence in connection with the testimony of Mr. Hill, and I will ask you about when that circular was published and in what manner it was distributed.

A. This circular was published early in 1897.
[206—117]

Q. How was it distributed?

A. This was mailed to the stockholders and creditors and principal real estate men around town, and other people who were in the habit of investing.

Q. Was that mailed to all the creditors, so far as you had a list of them? A. Yes.

Q. And those receiver's certificates which are referred to in the circular, then would mean the creditors of the estate? A. Yes.

Q. You say in this document: "In view of the great difficulty and necessary sacrifice in converting into cash the real estate and other assets of this trust, I have been authorized by the Comptroller to effect exchanges of such assets for outstanding receiver's certificates with such holders as may desire to do so upon a satisfactory basis." In what manner were those exchanges made—how did you conduct that business?

A. They would surrender their claims, and real estate would be given to them in lieu thereof.

Q. Now, in making those bargains by which you would transfer real estate for claims against the bank, who had the discretion for fixing the terms?

A. I did.

(Testimony of Charles H. Baker.)

Q. That was given to you by the Comptroller, was it? A. Yes.

Q. Prior to the first of November, 1897, did you have an application in response to this circular, or otherwise, from any creditor of the bank to exchange his claim against the bank for any of these listed Seattle tide lands?

A. I do not recall that there was any application.

Q. Was there any application to purchase those tide lands?

A. None whatever. There were no applications to purchase the tide lands, and I do not remember that there were to purchase the other assets either.

Q. What were the terms which you were ready to offer in that respect—well, did you put a price upon those lands? A. No.

Q. In other words, did this circular or this effort to make these exchanges in any way enable you to dispose of those tide lands or other lands?

A. No, it did not serve any useful purpose. [207—118]

Q. What was the condition of what might be called the outside real estate market at that time?

A. It was absolutely dead. There was not a market.

Q. And for what period of time did this dead condition continue, with reference to your receivership; did it continue to the termination of your receivership? A. Yes.

Q. Now, Mr. Baker, it has been shown here by the exhibits in this case that in the month of November,

(Testimony of Charles H. Baker.)

1897, there was a transaction by which Mr. Sol G. Simpson became the assignee of certain Seattle tideland contracts—the record shows that there were two contracts, 727 covering block 429 and 728 covering block 430, the land office numbers being 727 and 728; the record shows that they were transferred to Sol G. Simpson under date of November, 1897. Now, you may state fully to the Court just what occurred in connection with this transfer to Sol G. Simpson.

A. When the examiner was here he said that the practice of the Department, when the assets got slow and stagnant, was to close them up as expeditiously as they could by private sale, and to that end they authorized the receivers, under a blank order, to make the best sales an disposition that they could. Mr. Seeley was the examiner here at that time and he, therefore, had a petition prepared to the Court to authorize such a general order, and a general order from the Comptroller was obtained.

Mr. BAUSMAN.—A general order what?

A. (Continuing.) From the comptroller. Then in the latter part of November, 1897, I took these contracts to Mr. Simpson and Mr. Anderson and tried to get them to buy them. I wanted them to buy all the bank's holdings, and Mr. Anderson was not interested and did not see anything in them. Mr. Simpson did not, but he asked me to make price on them, and the price I made was the cost of it plus fifty dollars on each contract, and Mr. Simpson said he would take two of them. So that disposed of the

(Testimony of Charles H. Baker.)

first two of the bank's holdings in tide lands, and that was the first offer, with the exception of a dollar apiece that had been obtained, since we had them.

Q. You say you had had an offer of a dollar apiece, when was that offer made?

A. Well, that was made about the middle of 1897, I should say.

Q. Was that offer of a dollar apiece for the assignment of the contract as it then stood, or a dollar apiece profit to the trust?

A. A dollar apiece for the contract as it stood.

Q. You had made at that time payments to the State? [208—119] A. Yes.

Q. And Mr. Simpson was to pay you, in addition to what you had paid to the State, fifty dollars for each contract, was that correct? A. Yes.

Q. That was your arrangement with him?

A. Yes.

Q. Did Mr. Simpson give you any money or other equivalent of money with which to consummate this transaction?

A. I think he gave his check for it.

Q. In determining how much you had in these contracts, from whom did you get the information, that is how much the trust had in them, from whom did you get the information?

A. From Mr. Hill, who was the clerk.

Q. He was your clerk and bookkeeper, wasn't he?

A. Yes.

Q. And to the result given you by Mr. Hill, then you added fifty dollars, is that what I understood

(Testimony of Charles H. Baker.)

you to say was done?

A. Added fifty dollars to the figures given me by Mr. Hill.

Q. If there was an error in that computation, it resulted in that way, did it? A. Yes.

Q. At that time, Mr. Baker, and for a considerable time after that did you have any reserve interest, in expectancy or actual, present or in expectancy, in those two contracts? A. I did not.

Q. Did you at that time have any expectation of ever acquiring any interest in those two contracts?

A. I did not.

Q. What were the personal relations between you and Mr. Simpson at that time?

A. I had known Mr. Simpson for about three years and we were very good friends.

Q. Was Mr. Simpson a man of large affairs?

A. Well, Mr. Simpson was reputed to be the largest lumberman on the Sound and a very wealthy man.

Q. Was he a man who speculated to some extent in property? [209—120]

A. Yes, sir, he was always taking flyers.

Q. Was Mr. Anderson a friend of yours at that time? A. He was.

Q. Were Mr. Anderson and Mr. Simpson friends?

A. They were very close friends.

Q. How did they office?

A. They had an office—a suite of offices downtown in the Union Block; two or three rooms. They had a room together with a stenographer, and they had

(Testimony of Charles H. Baker.)

a couple of other rooms where their clerks were.

Q. Were they business associates, do you know?

A. Yes, they were.

Q. And they were both good friends? A. Yes.

Q. Shortly after this transaction in November, or contemporaneously with it, Mr. Baker, do you know what was done with reference to reporting the matter to the Comptroller of the Currency?

A. Well, it was entered in the quarterly report.

Q. In the usual and ordinary way of those reports?

A. Yes.

Q. Have you examined the exhibit which has been put in here as Exhibit No. 9, I believe it is, showing the quarterly report for the 30th of November, 1897, the one which was put in here at the trial?

A. I saw it when it was introduced.

Q. Was that the ordinary form of report which was sent to the comptroller?

A. That was the usual way.

Q. And those tide-land lots were listed there by number, were they not? A. I think they were.

Q. Was the money remitted to the comptroller?

Mr. BAUSMAN.—The tide-land lots or blocks were not referred to in that report, but only the number of the contract.

Q. (Mr. CROSSCUP.) The tide-land contracts were listed by number?

A. I suppose they were—I do not recall how it was done. [210—121]

Q. They were listed in your office by number, were they not? A. They were.

(Testimony of Charles H. Baker.)

The COURT.—I would like to ask one question here, and that is whether a report was made to the Comptroller of the Currency at the time of the purchase of those tide lands from the State and the contract received from the State for the purchase?

The WITNESS.—I do not remember whether it was made at the time or the next quarterly report.

The COURT.—Well, was it made at any time?

A. Yes, sir.

Mr. GROSSCUP.—The exhibit shows the money.

Mr. BAUSMAN.—Only it is shown by this exhibit.

The COURT.—I mean whether the comptroller's office knew whether contract No. 727 and 728 represented the purchase of these blocks from the State.

Mr. BAUSMAN.—No, sir; there is no such report.

Q. (Mr. GROSSCUP.) Did those numbers show the listing in your assets? A. They did.

Q. And the contract number would refer to the tide lands, so that in checking up those numbers it would be shown from the record what tide lands were transferred? A. Yes, sir, it would.

Mr. GROSSCUP.—It would be shown by the books that these were all entered among the assets by the contract numbers of the records at Olympia.

The COURT.—My inquiry was whether the comptroller's office showed them in that manner. Were they listed in your list of assets by number, by the land commissioner's number?

A. They were.

Q. (Mr. GROSSCUP.) Now, Mr. Baker, you say Mr. Seeley checked up and procured this order from the comptroller; just state how that business was

(Testimony of Charles H. Baker.)

handled in your office.

A. Mr. Seeley was here—

The COURT.—My inquiry was whether the comptroller's attention was called to the fact that No. 727 and 728 represented blocks in the tide lands.

Mr. GROSSCUP.—They could ascertain that when they looked at their list. [211—122]

Q. I will ask you, Mr. Baker, with reference to the additional assets, were they reported to the comptroller, that is, when you acquired those tide land contracts were they reported to the comptroller by contract number of the land office at Olympia, that is the land office contract number.

A. They were reported by contract numbers and I think by block numbers as well.

Q. (Mr. GROSSCUP.) Contract number covering certain blocks? A. Yes.

Q. (Mr. GROSSCUP.) Now, Mr. Baker, do you know what has become of Mr. Seeley?

A. Mr. Seeley is dead.

Q. I will ask you whether you ever had any intention or design, in reporting this sale to the comptroller, of concealing or covering up anything?

A. I never had any such intention. Never was any such intention.

Q. Do you know, as a matter of fact, whether the comptroller did know that you had sold those blocks, or his examiner?

Mr. BAUSMAN.—I object to that.

Mr. GROSSCUP.—I am asking whether the comptroller or any of his examiners knew it.

A. His examiners knew about it.

(Testimony of Charles H. Baker.)

Q. After this sale was your office examined, along in the early part of 1898?

A. I think it was examined about every six months.

Q. Now, Mr. Baker, in the early part of 1898 did you take on or take over a private enterprise known as the Snoqualmie Falls Power Company?

A. I organized the enterprise myself—promoted it.

Q. In connection with that corporation which was formed—when was the corporation formed?

A. The Snoqualmie Falls Power Company was organized in January, 1898.

Q. Who were the trustees of that company?

A. Mr. Anderson, Mr. Simpson, myself and Mr. Spencer, I think—

Mr. BAUSMAN.—And Mr. Lester Turner was one too, wasn't he?

Mr. GROSSCUP.—No, not at that time—well, it is not material—the other was Judge Burke, I think in the beginning. [212—123]

Q. Did you begin about that time the actual construction of what is known as the Snoqualmie Falls Power plant? A. I did.

Q. In connection with that power plant—the purpose of that power plant was to supply electricity as a public service corporation, was it not?

A. That was the purpose, yes.

Q. Did that power plant get into business rivalry with other competing interests in the power field?

A. Yes, it immediately aroused the antagonism of the General Electric Company which was interested—

Q. Did this business rivalry lead to charges against

(Testimony of Charles H. Baker.)

you in the administration of your trust as receiver of the bank, to your knowledge, answer that yes or no.

Mr. BAUSMAN.—I object to that.

The COURT.—What is the purpose of the question?

Mr. GROSSCUP.—I have no objection to stating the purpose of the question. I want to show that that business rivalry resulted in a very scrutinizing investigation of this trust.

Mr. BAUSMAN.—Go ahead.

A. (By the WITNESS.) It did.

Q. (Mr. GROSSCUP.) Had there been opposition to your appointment as receiver?

A. There was a very great opposition to my appointment.

Q. Do you know whether or not charges were made against your administration of this trust, along about the year 1898, and from then on?

A. Yes, there were a good many charges—there were several charges.

Q. Do you know whether a special examiner came here to investigate those matters?

A. Mr. Wing was a special examiner and he came for that purpose.

Q. At the instance of whom, as you were informed?

A. The comptroller.

Q. Now, you may state to the Court what examination Mr. Wing made of the affairs of your trust.

A. He made the usual examination that every examiner makes as to the condition of the assets, of the assets which had been liquidated and so forth, and

(Testimony of Charles H. Baker.)

then he stated that [213—124] he had been charged to investigate a number of complaints that had been filed, and particularly complaints with reference to Anderson and Simpson. Just what the complaints were he did not disclose except that they were complaints.

Q. Did he examine your books in that connection?

A. He did, yes.

Q. Did he make an unusually close examination of the properties that were remaining? A. He did.

Q. Now, do you know whether or not he was informed at that time of the sale of those two blocks No. 429 and 430 to Sol G. Simpson?

A. Yes, he was informed.

Q. And he was informed of the price at which you had sold them? A. He was.

Q. Was that a part of the investigation which he was making?

A. That was a part of the investigation.

Q. Mr. Hill testified here yesterday that he accompanied Mr. Wing over to West Seattle to see the tide lands; do you know whether he examined the balance of those tide lands in connection with the matter?

A. He went for that purpose and I suppose he did.

Q. In other words, that was the purpose you know that he went for? A. Yes.

Q. Did you discuss with Mr. Wing the value of those tide lands at that time, and the market conditions surrounding them? A. I did.

Q. Mr. Baker, before Mr. Wing left here did you have any conversation with him as to his conclusions

(Testimony of Charles H. Baker.)

about this investigation and what his report would be? A. No, he said nothing to me about it.

Mr. BAUSMAN.—This was in what year, 1898?

A. This was in 1898.

Q. About a year after the sale to Simpson?

A. I think it was. [214—125]

The COURT.—Proceed.

Q. (Mr. GROSSCUP.) Mr. Simpson was then living?

Mr. BAUSMAN.—Yes, the record shows that.

A. Mr. Wing interviewed Mr. Simpson and Anderson and a great many people around town, and the people in town who had made some complaints, and bankers and business men generally he interviewed.

Q. Mr. Baker, it appears from the correspondence here that the one matter left against you was your note in the bank and the controversy over this note; now, was or was not that the only thing left after these investigations, to your knowledge?

A. Yes, that was one of the complaints.

Q. Now, Mr. Baker, when did you first have any further offer or any offer for the balance of the West Seattle Tide Lands?

A. The next offer was early in 1899.

Q. About when, and by whom?

A. Mr. Anderson.

Q. Now, state what his offer was and just what occurred.

Mr. BAUSMAN.—At this time may I ask him to fix what time in 1899—he said early—about what month?

A. In the spring.

(Testimony of Charles H. Baker.)

Mr. BAUSMAN.—What month?

A. March, I should think.

Mr. GROSSCUP.—With reference to a certain letter here to the comptroller in which you reported a tentative agreement, how long before that letter was it?

Mr. BAUSMAN.—The letter was dated March 22d, I believe.

A. Well, I suppose it was immediately before.

Mr. BAUSMAN.—March 22, 1899?

A. Yes.

Q. (Mr. GROSSCUP.) In order to fix the time, this report was the conclusion of your negotiations with Mr. Anderson, is that correct? A. Yes.

Q. In connection with that negotiation with Mr. Anderson for the balance of these blocks, or the balance of these contracts, did you have any conversation with Mr. Simpson? A. I did. [215—126]

Q. And did or did not the negotiation—what was the fact about it—the negotiation with Mr. Anderson, in any way involve block 429?

A. I do not know whether it did or not.

Q. But you had a conversation, you say, with Mr. Simpson at that time? A. Yes, sir.

Q. Now state fully to the Court what that conversation was as far as you can remember it at this late date; the substance of it.

A. Well, I do not remember—

Mr. BAUSMAN.—We will object to these conversations with Mr. Simpson as self-serving in their nature, and we will reserve the argument to a later time.

(Testimony of Charles H. Baker.)

A. Shall I answer it?

Mr. GROSSCUP.—Certainly.

A. About this time Mr. Simpson said he was going—or was thinking of selling the other two blocks.

Mr. BAUSMAN.—This was in March, 1899?

A. Yes. Mr. Anderson's negotiations were for everything the bank held except the two blocks of Mr. Simpson's and Mr. Simpson talked of selling those two blocks, and I asked him if he would not sell me one and he said he would, so I bought block 430 for the cost of it and interest.

Mr. BAUSMAN.—The cost of it—may I ask him—

The WITNESS.—What he paid for it.

Mr. BAUSMAN.—You were still receiver?

A. Yes, I was receiver. I did not go out for a month after that, I think.

Q. (Mr. GROSSCUP.) Was this a personal transaction on your part? A. Yes, it was.

Q. Now, state fully what that transaction was and how you consummated it, state fully what occurred.

A. Well, I told him I would like to have him carry the title of it for me. I gave him a note for his advances and interest and I asked him to carry the title of it until I would get rid of my judgments. I was consolidating the street railways in Seattle and promoting this power company deal and had a large expectancy through the success of those projects, and he agreed to do it. That was the arrangement. [216—127]

Q. Was he at that time a director in the Snoqualmie Falls Power Company, or a trustee, I mean?

(Testimony of Charles H. Baker.)

A. Yes.

Q. He had an interest in that company—some interest in that company?

A. Yes, he had—a prospective interest.

Q. Had he a prospective interest—you say he had a prospective interest—in what way did he have a prospective interest—just very briefly, I don't want to go into the details of it.

A. Well, of course, I had a prospective interest in it by virtue of a stockholder.

Q. Well, he knew your prospects, that is what I want to get at. A. Yes, he knew of it.

Q. He knew all about the whole business?

A. Yes.

Q. At that time, Mr. Baker, did you believe that this West Seattle tide land properties had any greater value than the price that Mr. Anderson was agreeing to pay for them? A. No, I did not.

Q. What was the reason that Mr. Simpson was willing to turn this contract over to you covering block 430 at what it had cost him with interest, without any profit?

Mr. BAUSMAN.—I object to that.

Mr. GROSSCUP.—What did he say on that subject, if he said anything?

Mr. BAUSMAN.—He can answer it in that form, subject to our general objection to the conversations.

Mr. GROSSCUP.—What did he say, if anything?

A. Well, I don't know that he said anything. I reminded him that he was interested with me in the result of the power company, which he had great faith in himself.

(Testimony of Charles H. Baker.)

Q. Was or was not Mr. Simpson at that time a man of large wealth?

A. I suppose he was one of the wealthiest men in the Puget Sound country.

Q. When did Mr. Simpson become interested with you in the power company and its affiliated enterprises.

A. Well, he was interested before the power company matured, because the power company was an incident or offshoot of the consolidation project that I had to consolidate the [217—128] street railways here.

Q. Now, Mr. Baker, I see upon these letterheads "Seattle-Tacoma Power Company," I will ask you if that was the successor of the Snoqualmie Falls Power Company? A. It was.

Q. Were you the president of that company?

A. I was.

Q. Up to what time?

A. I was president until November, 1904.

Q. Who were the general attorneys of that company? A. Mr. Hardin.

Q. Who was associated with him as one of the general attorneys? A. Mr. Brockett.

Q. And were they your private counsel also?

A. Yes, they were.

Q. In the years 1906-7 were you in litigation in connection with securities growing out of this enterprise—just state whether you were or not.

A. I was.

Q. Was Mr. Hardin and Mr. Brockett in any way your counsel in those litigations?

(Testimony of Charles H. Baker.)

A. They were not counsel of record.

Q. Well, did they represent you? A. No.

Q. In what way did they represent you in your private affairs?

A. Anything that I had in a legal line they represented me in.

Q. Was their connection with you well known in this community as your attorneys?

A. Yes; they had no other connection except with me. Mr. Hardin had given up his private practice to join me.

Q. You dissolved your relations with the receivership in April, 1899—Mr. Frater has testified that his commission was sent you for delivery, and also his bond, I believe he said. A. Yes. [218—129]

Q. What was done with reference to transferring all the property to Mr. Frater? I mean the property of the bank now.

A. The remaining assets were canvassed between Mr. Frater and Mr. Hill, and Mr. Frater receipted for then and took possession, and delivered his bond and his commission had been sent to me by the comptroller and I delivered that to him when he delivered his bond and receipted for the assets.

Q. In connection with the examination of your trust from time to time were the books gone over at each examination?

A. At every examination the books were analyzed.

Q. And did the account show what assets had been disposed of during that quarter? A. Yes.

Q. Were the properties gone over at each examination? A. Yes.

(Testimony of Charles H. Baker.)

Q. That is, I mean the securities that were in your hands? A. Yes.

Q. The title deeds, contracts and so forth?

A. Everything was examined very carefully.

Q. Were those examiners regular national bank examiners?

A. No, they were not; they were examiners of receivers, I think they were called.

Q. Have you occasion to know from anything that may have occurred in connection with this receivership, whether any asset that came into one of those trusts could be lost sight of in any way in these examinations or in these reports?

A. Impossible to lose sight of it.

Q. Why?

A. Well, they had—in the first place they had very skillful examiners, and then the habit of checking up was such that nothing could escape—

Q. Did you disclose to Mr. Frater—did you go over those assets with Mr. Frater in connection with your transferring to him the remaining assets of the bank; just answer that question yes or no.

A. No, I don't think I did, Mr. Hill did.

Q. Did you have a conversation—

Mr. BAUSMAN.—Do you know that Mr. Hill did, or is this your belief? [219—130]

A. I know that Mr. Hill did. It is just possible that I came in in a different way.

Q. (Mr. GROSSCUP.) Did you have any discussion with Mr. Frater after he took charge of the receivership, concerning these tide lands?

A. I do not think I did.

(Testimony of Charles H. Baker.)

Q. Any of it, I mean? A. No.

Q. Now, Mr. Baker, you were actively engaged in the power business from the spring of 1899 down to 1903, when your father died? A. Yes.

Q. When did you take up with Mr. Simpson the matter of acquiring the legal title or the written assignment of this contract No. 728 covering block 430?

A. I think it was in the spring of 1904.

Q. Let me ask you this question: Was or was not the duplicate contracts as numbered by the State land office, signed by the commissioner of public lands, a part of the physical assets of the trust and in possession of you as receiver? A. They were.

Q. Now, when a sale took place what was done with that paper which you call a contract with the State?

A. It was assigned and delivered.

Mr. BAUSMAN.—Delivered to whom?

A. To the purchaser.

Q. (Mr. GROSSCUP.) After that time was that paper a part of the securities or files in the office?

A. No, sir, it was not.

Q. What was put in its place? A. The money.

Q. Well, what was done with the money then?

A. The money was transmitted to Washington.

Q. And what evidence did you preserve in your office to balance your account for this paper?

A. The record of the items and the books and reports.

Q. Now, Mr. Baker, I will go to 1904; your father, you say, died in 1903, October 6, I think it was.

[220—131]

Mr. BAUSMAN.—October, 1903.

(Testimony of Charles H. Baker.)

Mr. GROSSCUP.—And in 1904 you were expecting a partial distribution of your estate, were you?

A. Yes.

Q. Now, some letters have been introduced here to show that you were seeking a transfer of this contract to yourself; you heard the testimony of Mr. Reed, did you? A. Yes.

Q. Did Mr. Reed substantially state the facts in regard to that matter, or did he not?

A. I think he stated it correctly.

Q. From the time that you made this agreement with Mr. Simpson in the spring of 1899, a few days, as you expressed it, before the sale to Anderson, from that time on were you the equitable owner of contract No. 728 covering block 430? A. I was.

Q. It has been alleged in the complaint that Mr. Simpson was in bad health in 1904; is that a fact?

A. Yes, he was.

Q. Had you disposed of all of the claims that were against you at that time?

A. About all of them, yes.

Q. And what did you do with respect to getting a legal assignment of this contract?

A. Well, I had not any money to take it up, and I took it up with him on the basis of giving him my note.

Mr. BAUSMAN.—You are speaking of 1904 and 1905?

Mr. GROSSCUP.—1904.

A. (Continuing.) —and he agreed to do it.

Q. And then came the settlement with Mr. Reed, is that correct?

(Testimony of Charles H. Baker.)

A. He turned me over to Mr. Reed. Later he said Mr. Reed was managing his affairs and that he would settle it with me.

Q. And in connection with the settlement with Mr. Reed did you or did you not arrange to get the money that was required? A. I did later, yes.

Q. Did that cause some delay in consummating the transaction? [221—132]

A. Yes, considerable delay.

Q. Mr. Baker, after you took up the matter of getting an assignment of this contract No. 728 covering block 430, did you have any correspondence with the land office at Olympia respecting the harbor area in front of that block? A. Yes, I did.

Q. In connection with that correspondence I now show you a paper marked for identification—

Mr. BAUSMAN.—I have no objection to that.

(Document received in evidence and marked Defendants' Exhibit "A-9" and read to the Court as follows:)

Defendants' Exhibit "A-9" [Letter, Dated October 16, 1904, S. A. Calvert, Commissioner, to Charles H. Baker].

Department of Public Land,

Olympia, October 16, 1904.

Mr. Charles H. Baker,

Seattle, Wash.

Dear Sir:

Replying to your letter of the 14th will say that the harbor area fronting block 430 Seattle tide lands is

(Testimony of Charles H. Baker.)

already under lease to Mr. S. G. Simpson.

Yours truly,

S. A. CALVERT,

Commissioner.

Q. I show you a check dated August 10, 1905. To avoid multiplying exhibits I will state that this check under date of August 10, 1905, is on the Washington National Bank, Seattle, payable to Norwood W. Brockett, \$659.51. Signed Charles H. Baker.

(Check received in evidence and marked Defendants' Exhibit "A-10.")

Q. For what purpose was that check given and used?

A. That was to pay the taxes on block 430 that were delinquent; it was given for that purpose.

Q. Some correspondence has been shown here between Norwood W. Brockett and the State Land Commissioner concerning the title to this block. Was Mr. Brockett acting for you in that connection?

A. Yes, he was.

Q. Was the fact that Mr. Brockett was your attorney in this [222—133] community, to your knowledge, well known? A. Yes, it was.

Q. The exhibits in this case show, Mr. Baker, that you directed that this title should be placed in the name of Algernon S. Norton of Suffern, New York. Explain why the title was put in his name.

A. Mr. Norton was my attorney in New York and I was arranging to go to China to explore power and railway enterprises there and to be absent for a couple of years or so, and it was put in his name so

(Testimony of Charles H. Baker.)

that he could manage the property for me during my absence.

Q. Subsequently this company was incorporated.

Mr. BAUSMAN.—Which company?

Mr. GROSSCUP.—This defendant company, the Seattle Water Front Realty Company—and this title turned in in payment of the stock. A record brought here by the deposition of Mr. Norton shows that two hundred and fifty shares of stock were transferred to you personally and that certain other shares of the stock to Mr. Norton and certain to other people, leaving approximately three-quarters of the stock in the name of Mr. Norton. Why was that stock left in the name of Norton?

A. It was left so that he could sell the stock and manage the company—giving him a majority of the voting control so that he could elect directors and manage it during my absence.

Q. Was it the purpose to sell this property from the time you acquired it? A. Yes, it was.

Q. In connection with this stock did you make a loan in New York, or in New York State?

A. Yes, sir, I did.

Q. From whom?

A. From the National Bank of Suffern, New York.

Q. Was your stock pledged as collateral to that loan? A. Yes, it was.

Q. In connection with that pledge, do you know whether the bank of Suffern made inquiry in the city of Seattle as to the value of this stock and your connection with the company?

(Testimony of Charles H. Baker.)

Mr. BAUSMAN.—I object to that as irrelevant, immaterial and incompetent.

The COURT.—He can answer.

A. Yes, they inquired of their correspondent, the Seattle National Bank here in Seattle. [223—134]

Q. (Mr. GROSSCUP.) Have you looked up your memorandum to see about the date of that transaction? A. I think it was in 1907.

Q. You have seen the cancelled note recently which reminds you of that? A. Yes.

Q. Mr. Baker, have you received for this property offers from real estate people in Seattle addressed to you personally?

A. McGraw & Kittinger made one offer for it.

Q. Was that addressed to you personally?

A. Yes.

Q. When was that?

A. That was when the railroad excitement came on in January, 1906, I think it was, the Union Pacific were buying terminals here then and had been doing so quietly, and when their operations were made public there was an immediate boom in tide lands, and this property and others rapidly increased in value.

Q. Mr. Baker, about the time that you were figuring on going to China or to the Orient, in December, 1904, I will ask you whether you received that letter (showing)? A. Yes, sir, I did.

(A letter was received in evidence and marked Defendants' Exhibit "A-11," and reads as follows:)

Defendants' Exhibit "A-11" [Letter, Dated December 16, 1904, Charles G. Dawes to Secretary of U. S. Legation, Tokio, Japan].

CENTRAL TRUST COMPANY OF ILLINOIS.
Chicago.

Office of the President. December 16, 1904.

Mr. Huntington Wilson,
Secretary of the United States Legation,
Tokio, Japan.

My dear Sir:

This will introduce Mr. Charles H. Baker, [224—135] formerly of Chicago and now a resident of Seattle, Washington.

Mr. Baker is a man of large business affairs and is responsible for the development of a large part of the electric power which the City of Seattle now enjoys. He is a man of standing and responsibility.

He is visiting Japan for a time and any courtesies shown him will be appreciated.

Respectfully,

CHARLES G. DAWES.

Q. Mr. Baker, in connection with your letter of May 9, 1904, to Mr. Mark Reed, you use this language: "I had a talk with Mr. Simpson in S. F. about the tide lands which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first two or three payments I made myself." I will ask you to what payments these "first two or three payments" refer, in that letter.

(Testimony of Charles H. Baker.)

A. It refers to the first payment that Mr. Simpson made.

Q. The first payment that Simpson made?

A. I settled with Mr. Simpson on the note covering the payments, and this letter refers to that settlement.

Q. In other words, now, let us see if I understand you, in your settlements with Mr. Simpson in 1899 you reimbursed him for what he had reimbursed the trust for on the two payments, and the third payment which he had made was included in that settlement; is that correct? A. Yes.

Q. Did you, upon any occasion, in substance or effect, discuss with Mr. Simpson the subject as to why you wished him to carry this contract in his name after you made this purchase in the spring of 1899, other than you have told upon the witness-stand? A. No, I did not.

Q. Now, coming to a direct question, did you ever tell Mr. Simpson that you wished him to take this title because you were receiver of the bank?

A. No, I did not.

Q. This agreement which has been shown here, this settlement between you and your wife, and which is marked as Defendants' Exhibit "A-3," you identify that as the agreement which you made?

A. Yes.

Mr. GROSSCUP.—You can cross-examine. [225—136]

Cross-examination.

Q. (Mr. BAUSMAN.) Now, Mr. Baker, do you state while you were receiver of this bank in the

(Testimony of Charles H. Baker.)

spring of 1899 you, as you say, bought back block 430 from Mr. Simpson while you were still receiver—block 430 of Seattle tide lands in the spring of 1899, while you were still receiver, for just what he had expended on it; is that true?

A. That and interest, yes.

Q. What—and interest? A. Yes.

Q. And what was the amount which you gave him?

A. I think it was about four hundred dollars.

Q. About four hundred dollars—you have also testified that you thought that to be the value of block 430 at that time, have you not? A. Yes.

Q. And it is in evidence that you sold—it is also in evidence that at that very time you sold to what you call Piggott and Hofius your merely contested rights in the adjoining block 431 for one thousand dollars; is that so? A. Yes.

Q. Next, Mr. Baker, what did Mr. Simpson give you as evidence that he had thus transferred back to you while receiver a title in that land?

A. He did not give me anything.

Q. Did he give you a scrap of paper?

A. No, he did not.

Q. He continued to hold it exactly as he had held it since 1897, didn't he, as far as the public record is concerned? A. Yes.

Q. When Mr. Turner testified here, in effect, that Mr. Simpson had said that that land had been put in his name by you because you were receiver—put in his, Mr. Simpson's, name, by you because you were receiver of the Merchants' National Bank—when he said that you heard your counsel, Mr. Shank,

(Testimony of Charles H. Baker.)

inquire at once—inquire of the witness, Mr. Turner, whether Mr. Simpson was not an honorable man, didn't you? A. I did. [226—137]

Q. You now admit on the stand, don't you, that Mr. Simpson carried that confidentially in his name for you from 1899 to 1905, don't you? A. I do.

Q. Your counsel inquired of you the honorable character of either of you in respect to that transaction—well, passing that inquiry which, perhaps, you do not want to answer, I will ask you this, at that time you were overwhelmed with debts, were you not? A. I was.

Q. And one of them was the note held by this very bank of which you were receiver, against yourself, wasn't it? A. Yes.

Q. For ten thousand dollars and interest. Now, Mr. Baker, this suit was begun in February, 1912, or thereabouts, wasn't it?

Mr. GROSSCUP.—1913.

Mr. BAUSMAN.—I beg pardon; 1913.

Q. Your answer in this case was filed in July, 1913, or thereabouts, wasn't it?

A. I do not know when it was filed.

Q. Well, it was filed in the summer of 1913. Before you filed that answer you had frequent conferences with Mr. Grosscup, your counsel, who has been examining you here. A. Not on this matter.

Q. Have you not testified in your examination heretofore that you did have such conferences with him? A. I had some, yes.

Q. Then you wish to retract the statement which you made just a moment ago that you had no confer-

(Testimony of Charles H. Baker.)

ences with him on this matter.

A. I did not say that.

Mr. GROSSCUP.—He did not make that statement. You asked him whether he had frequent conferences.

Q. (Mr. BAUSMAN.) Then you had conferences with him on the matter of your answer in this case.

A. I was with Mr. Grosscup every day—

Q. Answer me—you had conferences with him?

A. Yes. [227—138]

Q. And before he filed that answer you sent him down to Washington City to examine the comptroller's files, didn't you? A. I did.

Q. And he went there, didn't he? A. He did.

Q. As far as you know, and you do know, don't you, that this answer of yours was filed after he had made such examinations and had had conferences with you. A. It was filed after that, yes.

Q. And you know that he got also an extension of time from me in which to make his answer; that is true? A. Yes.

Q. Now, then, when you made that answer, in July or thereabouts, 1913, you did not then know of the existence of a certain blue letter here, written on the railroad, did you? A. No, I did not.

Q. This letter which I refer to now is Plaintiff's Exhibit 12, and accordingly in your answer you stated certain things, you stated in your answer that Mr. Simpson never had held that in trust for you, didn't you?

A. I didn't state anything in the answer. I never saw the answer until—

(Testimony of Charles H. Baker.)

Q. Well, then, your counsel stated it for you, after conferences and after an examination of certain exhibits, that Mr. Simpson never had held that in trust for you—you know that, don't you?

A. I think that is what the answer stated.

Q. And that answer is not true, is it?

A. No, it is not.

Q. As a matter of fact, you now admit on the stand that he had held it for six years in trust for you at least, don't you? A. Yes.

Q. And you wish to put upon your counsel the burden of making a misstatement so gross as that?

A. He can put it on himself—I did not know anything about the complaint.

Q. I am speaking about the answer now—in this same answer you said that this asset, block 430, Seattle tide land, was a desperate asset—that is in that answer, isn't it? [228—139]

A. I don't remember. I don't think it is.

Q. Suppose it to be in it, and the Court can see where it is—that is untrue, isn't it?

A. Well, it would be a very slow asset.

Q. I am asking you a question—answer it, please.

A. Repeat the question again.

(Question repeated to the witness.)

A. Yes, that was a desperate asset.

Q. You call it a desperate asset, notwithstanding your books listed it as “additional assets good.”

A. Those assets—

Q. (Interrupting.) Answer me that. You still say that, do you?

A. I am going to answer the question and I am go-

(Testimony of Charles H. Baker.)

ing to answer it in my own way.

Mr. BAUSMAN.—That may be as the Court determines, Mr. Baker. I think I have the right to an answer. You still say that this is a desperate asset, notwithstanding your books, as put in evidence here, list it as “Additional assets good”?

The COURT.—Answer that yes or no. A. Yes.

The COURT.—And then you may make your explanation.

Mr. BAUSMAN.—Now make the explanation.

A. The name of the asset is simply a classification. It means nothing. It is the classification that the asset took when it was first classified, and I assumed that the asset was good at least for the money that was in it.

Q. When you take on additional assets, meaning assets not acquired by the bank at the time of its failure, do you take them on unless they are good?

A. I would take on a dead horse if it came as an asset of the bank.

Q. And then you would list it as “Additional assets good.”

A. If I put good money in it at the first it certainly would be good.

Q. Then you would not put good money into it unless you thought it good, would you?

A. It was the putting of the good money in it that made the asset. [229—140]

Q. Certainly, and I ask you if you would put good money into a dead horse?

A. I have done it, but not on this occasion.

Q. Haven't you put the money into this tide land

(Testimony of Charles H. Baker.)

because, as you said in your letter to the comptroller in January, 1897: "This is a valuable asset of the trust"? A. Yes.

Q. Then it was listed as "additional assets good," wasn't it? A. It was.

Q. Now, further pursuing your idea that notwithstanding these things it was what you call a desperate asset, though you sold this to your friend Simpson in 1897, you kept some other assets called tide lands, didn't you? A. Yes.

Q. And you afterward sold those, in 1899, at a very great advance over what those in 1897 yielded?

A. A considerable advance.

Q. Then, in view of this very great increase in the value in those two years, and in view of your letter to the comptroller calling it a valuable asset of the estate, will you now say that your answer to this complaint, in reference to your rights in block 430, when you call it a desperate asset, was true?

A. When it first came to the comptroller it was a valuable asset.

Q. It was what?

A. It was a valuable asset. I would not have advised it otherwise.

Q. It came into your custody at the time you wrote that letter saying that it was a valuable asset in January, 1897, didn't it? A. Yes.

Q. And then came the Klondike excitement in July, 1897, didn't it? A. Yes.

Q. Then you wrote a letter in October, 1897, to the comptroller after the Klondike excitement, which letter you have heard read in evidence here, saying

(Testimony of Charles H. Baker.)

that things were going up generally and that there was going to be prosperity? A. Yes.

Q. And it was after that that you sold it to your friend [230—141] Simpson? A. It was.

Q. Are you still satisfied that your answer in this case stating that this was a desperate asset, is an honest answer?

A. Yes, because the years proved it to be.

Q. What?

A. The years that we held it during which it was utterly unsalable proved it to be.

Q. Yet you kept the other assets of tide lands and within eighteen months you sold them for thousands of dollars? A. Yes.

Q. And in 1899 when you bought back block 430 from Mr. Simpson, while you were still receiver, you paid him for this large block of twelve acres only three hundred dollars and interest, and you sold the adjoining land which you were in litigation about, your mere contest interest in it, for a thousand dollars at least, didn't you? A. Yes.

Q. And they were simultaneous transactions, practically? A. About, yes.

Q. You and Mr. Simpson and Mr. Anderson were very intimate, were you not?

A. Very good friends.

Q. You had offices together down in the Union Block? A. No.

Q. You had offices together, didn't you?

A. No.

Q. I will ask you now whether that statement in your answer in which you state that you bought back

(Testimony of Charles H. Baker.)

this property from S. G. Simpson, meaning block 430, in the open market, is a true statement?

A. I didn't say I bought it back in the open market.

Q. That is what *you* answer says in this case. Do you say now that you got it in the open market—do you say that now, that you got it back from Mr. Simpson in the open market?

A. No, it was not in the open market.

Q. Then if your answer before it was amended on the very date of this trial, yesterday—if your answer then stated [231—142] that you bought it back in the open market, that is not true, is it?

A. No, that is not true.

Q. And if your answer says—and I will read from the answer which says before it was amended the day before yesterday—at the close of paragraph four, “Denies that this defendant as receiver or in any other capacity held the contract for the purchase of said tide land for his own use and benefit after the sale to Sol G. Simpson until after he repurchased said block from Sol G. Simpson in the open market after the termination of his receivership.” I am reading the answer now before your wise counsel here amended it a day or two ago—your original answer says it was bought back in the open market; that is not true? A. No.

Q. And that original answer says it was bought back long after the expiration of the receivership, doesn't it? A. I believe it does.

Q. And that is not true, either, is it? A. No.

Q. That answer was drawn before you knew, I be-

(Testimony of Charles H. Baker.)

lieve you said, of the existence of this railroad letter, exhibit "12." A. Yes, it was.

Q. Continuing, Mr. Baker, on the matter of your answer: your answer in two or three places denies that you ever settled with Mr. Simpson by any reimbursement for any advances, you know that, don't you,—you know your answer says that, don't you?

A. I think it does.

Q. Now, Mr. Baker, you know that it does, because in the previous examination you had to admit that before, didn't you?

A. I wish you would read to me what it says. I never read the answer but once—I just casually saw it this morning.

Q. In paragraph five it says, "This defendant further denies that he from time to time or at all advanced to said Simpson or reimbursed the said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block"; is that true or is it not true?

A. No, that is not right.

Q. It is not true. Now, Mr. Baker, according to your stories,—according to your testimony both as to your settlement with Mr. Simpson in 1899 and your settlement in 1905, you never dealt with him on any other basis [232—143] than reimbursement for advances, did you?

A. Well, the final consummation of the arrangement was an upset price which included the disbursement.

Q. Now, Mr. Baker, you stated that in the spring of 1899 you settled with Mr. Simpson on the score

(Testimony of Charles H. Baker.)

of the advances he had made, didn't you?

A. Yes.

Q. And then it is not true in your answer when you say, "This defendant further denies that he from time to time or at all advanced to the said Simpson or reimbursed the said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block," that is not true then?

A. That is not true.

Q. Then when you come to 1905 you reimbursed him then for advances on block 430, didn't you?

A. I paid this price which included all his advances and taxes and interests.

Q. You settled with him on the score of advances made, didn't you?

A. And including the tide-land deeds.

Q. But that has reference here to "said block" in your answer, and yet you deny that you ever reimbursed him for it, is that true or not true, in 1905?

A. It is not true.

Q. There again you were ignorant of this blue letter written on the railroad when you told your counsel to file that answer? A. Yes.

Q. In the letter of May 9, 1904, written on the railroad, you say, addressing Mr. Reed about Mr. Simpson: "I asked him if he would take my note in settlement of advances he has made together with the interest accrued thereon"; in the light of that letter you wish to say that that statement made in your answer is untrue, both as to 1899 and as to 1905, don't you? A. Yes, sir, it is untrue.

Q. Is it possible that you had hopes at that time,

(Testimony of Charles H. Baker.)

Mr. Baker, that this letter would never be discovered? A. No.

Q. Mr. Baker—

Mr. GROSSCUP.—Just let him answer it. [233—144]

Mr. BAUSMAN.—He has answered it.

Q. Mr. Baker, after this letter was discovered the Seattle Water Front Realty Company had filed an amended answer, hadn't it? A. I don't know.

Q. You were the largest stockholder in it—do you know whether it had filed an amended answer?

A. I know it did.

Q. It had filed an amended answer after the revelations in this letter?

A. I don't know when it was filed.

Q. After the revelations contained in this letter and several simultaneous documents, it was found necessary to amend the answer, wasn't it—just state that—you know it, don't you?

A. The answer was amended, yes.

Q. That is known as the Seattle Water Front Realty Company? A. Yes.

Q. Did *you* counsel have a conversation with you as to whether you should amend your personal answer in the case after that revelation? A. Yes.

Q. And they decided that they would not file a new amended answer for you, didn't they?

A. No, they said they would make the amendments when the case was called.

Q. But they said though they did not wish to file a formal written answer for you anyway, didn't they? A. No, they did not say that.

(Testimony of Charles H. Baker.)

Q. But such circumstances came to pass that they considered it imprudent to reduce your statements again to definite form?

A. Mr. Grosscup told me from the beginning that—

Q. Never mind about the beginning, just answer that question. A. Will you repeat the question?

(Question repeated to witness.)

Mr. BAUSMAN.—That is the question that I want you to answer. [234—145]

A. Well, they said they would have to make the amendments when the case was called.

Q. Now, they made no amendments to this answer other than those that were made by interlineation here in court the day before yesterday at the opening of the trial, that is true, isn't it?

A. I think so.

Q. Now, then, you sold this property to Mr. Simpson in 1897, for less than you had paid the State of Washington, didn't you? A. Yes.

Q. And when you bought it back from Mr. Simpson, as you call it, in the spring of 1899, March, I believe, was the month, you say you bought it back for what he had advanced on the property, is that correct? A. Yes.

Q. Did you reimburse the trust for the omitted money?

A. I did not know there was an omission until I was here last fall.

Q. Now, Mr. Baker, the first letter which you addressed the Comptroller of the Currency in regard to this property was, was it not, this paper which

(Testimony of Charles H. Baker.)

I now hand you marked Plaintiff's Exhibit No. 3 (showing)? A. Yes.

Q. Now, in this Plaintiff's Exhibit No. 3 you use the following language—which was read.

You meant to ratify the contracts, did you, Mr. Baker— A. Yes.

Q. Now, then, Mr. Baker, the next communication you had with the comptroller's office was in your general report of November 30, after you had sold to Mr. Sol G. Simpson. A. I think so.

Q. Now, will you please show the Court in what language, where and in what manner, you refer to block 430 in that (handing report to witness).

A. This is a general—

Q. (Interrupting.) I beg your pardon, but the paper I now show you, in order to identify the reference, is Plaintiff's Exhibit No. 9, being your quarterly report of November 30th.

A. This is the regular form or report.

Q. Yes. Now, will you please explain to the Court, pointing [235—146] out where you refer to this block 430, or in what language you refer to it.

A. There is not any reference to block 430, or to any other asset by name. This report is a report of aggregates, and is accompanied by schedules.

Q. Now, find out in that report where you made a reference to this transaction.

A. Well, I do not see any reference in it.

Q. Mr. Baker, for your information I will state that this transaction is referred to in this exhibit No. 9, and now that you are very familiar with this case and have had plenty of time, I will ask you to

(Testimony of Charles H. Baker.)

point out to this Court where that reference is contained, in order that the Court can ascertain how quickly an examiner in Washington could probably discover it. A. "Schedule E annexed"—

Q. Read it to the Court.

A. "Schedule E, fractional quarter ending November 30, 1897. Collections of other assets acquired since suspension by the receiver of the Merchants' National Bank. Date. Segregation of assets, good, doubtful, worthless. Amount to date of last report, good \$22,548.82; doubtful \$8,354.35. Sold to S. C. Simpson tide-land contracts 727 and 728 \$315.20."

Q. I will ask you whether that speaks of block 430 there? A. No, it does not.

Q. Will you please point out to the Court, if you can now, any place in which you have reported to the comptroller of the currency the sale of block 430 by name? A. That report shows there.

Q. That is the only one you know of, is it?

A. I think there are others.

Q. What others—you and your counsel have conferred—what others?

A. I think one went in evidence yesterday.

Q. What one is it? A. I don't remember.

Q. Now, then, in this one you do not refer to block 430, you say, and I am asking you the question where block 430 is referred to in any report made by you to the comptroller, other than under the designation of "Contract 728."

A. That is the proper designation for that property. [236—147]

Q. I did not ask you that question; your counsel

(Testimony of Charles H. Baker.)

may ask you that; I am asking you this question please, can you tell me any other report or written communication by you to the comptroller referring to block 430 by name?

A. I do not know of any other.

Q. This is the final reference you ever made in any report either to contract No. 728 or to block 430, isn't it—that closed the transaction, didn't it?

A. Yes, sir.

Q. Now, Mr. Baker, at the time you were appointed receiver of this bank a great protest went up from the people of Seattle about your appointment? A. Yes.

Q. Some people who might have thought you eligible to the postmastership which the Department refused to give you, probably did not consider you to be a proper person to be receiver of a bank to which you were indebted; isn't that true?

A. Yes.

Q. You owed your appointment to your wealthy father living in Chicago, didn't you? A. Partly.

Q. He was a great friend of Mr. Eckels, the comptroller of the currency, was he not? A. Yes.

Q. People said you ought to pay this ten thousand dollar note, didn't they, which you owed the Merchants' National Bank, didn't they—now I am asking you what you think about it and what people said in their protest?

A. That was one of the complaints, that I had a note in the bank that ought to be paid.

Q. You were appointed in what year?

A. In 1895.

(Testimony of Charles H. Baker.)

Q. Two long years had passed and you had done nothing in respect to the payment of that note, had you—it is now 1897, we will say?

A. That note was paid before I went in.

Q. Now, Mr. Baker, it has been admitted by you and it was listed as one of the assets of this estate at the time you became receiver; I am not asking you for your legal conclusion, but I am asking you whether *it* point of fact this was not a listed asset of the Merchants' National Bank at the time of your receivership? [237—148]

A. I think it was a charged-off item.

Q. A charged-off item means an item which is still an asset, but just regarded as worthless, is that it? A. Yes.

Q. It was then, at the time of your appointment, an asset of the bank? A. It was.

The witness testified that about November 10, 1897, he received a written request from Comptroller Eckels that he submit to a Court, through lawyers not connected with the trust, a petition in respect to his indebtedness on the \$10,000.00 note, the creditors to be represented *contra*; but that he never took any action upon this request. Also that the Rainier Power & Railway Company went into the hands of a receiver and that no dividend was ever declared to its creditors, but his collateral securities were sold by the bank and that he demanded an accounting from them. [238—149]

Q. Now, Mr. Baker, you know that is a matter that Mr. Wing investigated and reported on adversely to you, didn't he?

(Testimony of Charles H. Baker.)

A. I know that he reported adversely.

Q. And compelled you to restore that note to the listed assets of the trust, didn't he—didn't he now?

A. I do not have any recollection of that note going out of the bank, and you know it.

Q. And what?

A. And you know that I have no recollection of it.

Q. I do not think that is a proper answer for you to make, and I will read you something in a minute—I will ask you whether on December 17th, 1898 Mr. Wing did not examine your affairs?

A. He did about that time.

Q. And whether he did not say that you sent that note to Wells, Fargo & Company along with some bonds which you have sold.

A. I don't know what he said.

Q. Will you say that he did not say that?

A. I don't think I ever knew what he said.

Q. Did you have conversations with Mr. Wing about this note? A. Yes.

Q. He told you that you owed that note, didn't he?

A. I don't think Mr. Wing made any conclusions to me—he made those to the comptroller and I don't know what they were.

Q. You know that Mr. E. W. Andrews, the president of the Seattle National Bank of this city sent that note back to you, that you claimed to Wing that you received it only back in your individual capacity, and did not relist it as an asset of the trust, isn't that so?

A. I don't remember that at all. [239—149a]

(Testimony of Charles H. Baker.)

Q. And then the department made you restore that note, didn't they?

A. I don't remember it. I don't know anything about it. Whatever the record says there I will stand by. The note was there when I left.

Q. Now, Mr. Baker, the decision of the department was, at the close of '98, you not having tried to have this matter adjudicated fairly under the suggestion of Mr. Eckels, the decision of the department was that that note was an asset of the trust, wasn't it? A. Yes.

Q. It had always been, in contemplation of the department, an asset of the trust, hadn't it?

A. Yes.

Q. Then, Mr. Baker, you found that you had to leave this receivership didn't you?

A. I calculated that it was inconsistent for me to be receiver and owe the bank, according to the determination of the comptroller.

Q. You knew that the department had made up its mind that you would do nothing with that note except to argue about it, didn't you?

A. Not until the final decision.

Q. And then when you gave your resignation on March 13, 1899—I want to refer to that letter.

The COURT.—I remember the substance of the letter.

Mr. BAUSMAN.—There is certain language in it that I want to call attention to—I don't seem to be able to find it right now.

Q. Assuming the language in it to begin—you addressed the comptroller in it under date of March

(Testimony of Charles H. Baker.)

13, 1899, and you say, "Now, that by your decision an asset of the trust"—or "my note has become an asset of the trust" I do so and so—you used that language, didn't you?

A. Just about that language.

Q. Assuming that that is the exact language of your letter of resignation, I want to ask you—here is the letter, it is Exhibit "H," under date of March 13, 1899, you address the Comptroller Dawes and you say, "Dear Sir: I respectfully call your attention to your recent decision whereby a note signed by me prior to the suspension of the bank now becomes an asset of the trust." That is the language you used?

A. Yes.

Q. Will you state, Mr. Baker, why you said, "It now becomes an asset of the trust," when you admitted it was an asset of the trust from the beginning? [240—150]

A. It was an asset from the beginning that was contested.

Q. And you had not submitted it to a court of jurisdiction under Mr. Eckels' suggestion, but you had kept on your way for four years, or thereabouts, claiming that it had no rights, is that so?

A. Yes.

Q. And you thought in resigning that you could save your face by a very delicately written letter showing a high sense of honor and reciting that this had now become an asset of the trust?

A. I had no such thought.

Q. Did you then, since this was going to charge you by this decision with ten thousand dollars of

(Testimony of Charles H. Baker.)

liability, did you then claim an adjudication upon that note and have it submitted to see whether this was right that the department should so decide against you? A. When I resigned, you mean?

Q. When the decision reached you of the department rather than a decision of a court of justice.

A. No, sir, I resigned.

Q. And you did not claim a legal adjudication under the permission given you by Mr. Eckels, did you? A. No.

Q. Now, then, you quit the trust owing it ten thousand dollars so far as you had not attempted to clear yourself from it in any court, had you?

A. So far as any adjudicated claim was concerned.

Q. You had the right to bring suit for cancellation of that note, did you do so? A. No.

Q. Mr. Baker, you have vainly sought—or you have sought to impress this Court with the idea that Judge Stratton's opinion—a very excellent man—was your safeguard, whom you have said was in the employment of your trust and receiving a salary from it, that is true, is it not? A. Yes.

Q. Did you tell the department in a certain letter of October, 1897 that the attorney for the bank, Mr. Ira Bronson, took a different position—did you tell them that? A. No, I did not.

Q. Mr. Bronson is a lawyer of ability and standing, was he not? A. Yes. [241—151]

Q. Did you tell them also that even if your legal position was correct and that the bank had converted the collateral, that the collateral was worthless and there could not be any damages ensuing to

(Testimony of Charles H. Baker.)

you; you did not tell them that, did you?

A. The collateral was not worthless.

Q. How is that?

A. The collateral was not worthless.

Q. Then, Mr. Baker, as I had myself the reorganization of some of these properties, possibly I can refresh your memory. The notes you testified about I believe as the collateral notes to your notes, were those of D. T. Denny? A. Yes.

Q. He became absolutely hopelessly insolvent, didn't he? A. He did.

Q. The other collateral which went in, was the bonds of the Rainier Power & Railway Company, which was a D. T. Denny corporation?

A. Yes, sir.

Q. And that went into the hands of a receiver and became absolutely worthless, didn't it?

A. It did not and you know it.

Q. Passing that now, Mr. Baker, when did you get out of debt?

A. Oh, I got out of debt in 1905, completely out of debt in 1905.

Q. About what time, may I ask you?

A. Well, about the time I settled up with Mr. Reed.

Q. Just a little before that you got out of debt—do you remember that you opened bank accounts in Seattle about that time, so that I assume that in the summer of 1905 you were clear of debt? A. Yes.

Q. Then in 1905, being cleared of debt, except that you had nothing paid on this note to the bank, you never paid that, did you?

(Testimony of Charles H. Baker.)

A. That note was sold by Mr. Frater and Mr. Hardin, or my father I think bought it in.

Q. Your ten thousand dollar note then was sold as a worthless asset of the bank and your father bought it in?

A. No, it was sold to somebody out of the bank and Mr. Hardin bought it from him later on.
[242—152]

Q. This Hardin is your lawyer? A. Yes.

Q. He lived in Seattle up to 1905 and then he followed you to New York, in a sense? A. Yes.

Q. So that is the way you discharged the note, was it not now?

The COURT.—The Court understands that.

Q. (Mr. BAUSMAN.) You were then free of debt in 1905?

A. Yes.

Q. You are free of debt I believe you stated; is that correct? A. Yes.

Q. And then you took the property out of Mr. Simpson's name, didn't you? A. Yes.

Q. But you did not take it to Charles H. Baker, did you? A. No. [243—153]

Q. Had it occurred to you that possibly a transfer of twelve acres of tide lands to Charles H. Baker might attract attention in Seattle and somebody see that you had suddenly gotten in position to own a large tract of land, in the year 1905?

A. No.

Q. But you did not then take it into your name, did you? A. No, I did not.

Q. You took it in the name of Algernon S. Norton,

(Testimony of Charles H. Baker.)

didn't you? A. Yes.

Q. He was your lawyer in New York, was he not?

A. Yes.

Q. He gave, I believe he states, no consideration for it so far as he was concerned, he held it only for you, didn't he? A. Yes.

Q. And then you had this Mr. Norton give you a declaration of trust, didn't you?

A. No, I didn't ask him to.

Q. He just gave it to you—then you were not satisfied with that, but you got a second declaration of trust from him in 1906, didn't you?

A. There were two declarations of trust—I do not know why there were two.

Q. And neither of them were recorded?

A. No.

Q. Then in 1907 you transferred this property from Norton to the Seattle Water Front Realty Company? A. Yes.

Q. I will retrace my steps for one moment. You have stated that one of the reasons for keeping the title in the name of Mr. Norton was that you thought you might go to China; is that true? A. Yes.

Q. I will recall your mind to the testimony given by Mr. Norton in his deposition, in which being asked to explain why you did not keep it in your name and give him a power of attorney, he says he did not know any reason—now, do you know any reason? A. No.

Q. And he states further that although he kept it in his name for facility of selling, yet he would not

(Testimony of Charles H. Baker.)

be allowed to make a sale, or words to that effect, unless he reported it to you even if you were in China; that is true too, isn't it—you heard that testimony yesterday?

A. I don't know whether he referred to my being in China or not.

Q. But any sale that he made he must report to you? A. Yes.

Q. So that he would have no greater powers under the deed to sell it than he would have had under a power of attorney, so far as you were concerned, you would have to ratify it, is that not so? A. Yes.

Q. Then, Mr. Baker, the next thing you do is in 1907, after it had been held in trust for you by Mr. Norton two years, you caused [244—153a] to be organized the Seattle Water Front Realty Company, didn't you? A. Yes.

Q. You have heard Mr. Norton's testimony in which he says he got five per cent ultimately out of that in various ways, which he described, and that the rest became yours, you know that, don't you?

A. Yes.

Q. And though you owned ninety-five per cent of the stock of that corporation, you never became a director from that day to this, did you? A. No.

Q. And from the organization of that company in Seattle—it was in Seattle, was it not? A. Yes.

Q. From the organization of that company in Seattle in 1907 you corroborate Mr. Norton, do you not, that the books and records of the company were all taken over to New York and kept there?

(Testimony of Charles H. Baker.)

A. Yes.

Q. You were aware of that law, perhaps, of the State of Washington, which requires a company to file in a public office a list of its directors—you know that, don't you? A. No.

Q. You had been director of a number of companies in Seattle which your father owned, hadn't you?

A. Yes.

Q. And you do not know of that law?

A. No, I do not recall it.

Q. At any rate you never became a director in that company? A. No, I never did.

Q. That company's books and records remained in New York, and you lived in New York, didn't you?

A. Well, I had New York for headquarters, but I was mostly in the south, Nicaragua.

Q. Well, it takes only a day to go to the south, down to Nashville and such places. A. Yes, sir.

Q. New York was your home and you were there nearly all the time? A. No.

Q. You were there most of the time, were you not?

A. Probably half the time.

Q. And your present home is in New York, or in the suburbs of New York, is it not? A. Yes.

Q. At various times the name of Mr. Thomas B. Hardin has been mentioned here; he was one of your counsel, was he not? A. He was.

Q. It appears by some of the exhibits that he is connected with this business, or had something to do with the closing of the Simpson transaction, is that true?

(Testimony of Charles H. Baker.)

A. No, I don't think he had anything to do with the closing of it.

Q. He knew of your relations with Simpson, did he not? A. Yes.

Q. He was your confidential attorney, was he not?
A. Yes.

Q. Have you asked for his deposition to be taken in this case? A. No.

Q. Mr. Meacham is referred to by Mr. Norton here as the gentleman who had a continual correspondence with Mr. Norton; have you attempted to subpoena Mr. Meacham?

A. I have not. He was expected to be here as a witness.

Q. When did you see him last?

A. Oh, six months ago. [244—153b]

Q. Didn't you write to Mr. Brockett and tell him not to divulge any information to us? A. No.

Q. Never wrote him any letter of that kind?

A. I don't think so.

Q. Will you swear to that? A. Yes.

Q. This Mr. Brockett is the man whom it was stated here by you, closed the transaction with Mr. Simpson, is that correct? A. Yes.

Q. Certain papers were put in here showing Mr. Brockett's correspondence with the state land office, can you point out anything in those exhibits where he mentions the name of Charles H. Baker?

A. I never saw the exhibits until this morning—in fact I have not seen them yet.

Mr. BAUSMAN.—Will counsel admit that the

(Testimony of Charles H. Baker.)

name of Charles H. Baker does not appear in those exhibits which you filed as letters from Mr. Brockett to the state land office?

The COURT.—The exhibits will show for themselves.

Q. (Mr. BAUSMAN.) Assuming that the letters show that Mr. Norton's and Mr. Simpson's names are mentioned in those letters of Mr. Brockett, I will ask you finally and no longer, whether you do not know as a matter of fact, from consultation with your counsel, that your name, Charles H. Baker, is not mentioned by him to the land office in that correspondence. A. I don't think it is.

Q. Have you subpoenaed Mr. Brockett to testify here to-day? A. No.

Q. You know he is in this city, don't you?

A. No, I do not.

Q. You are willing if he is out of town, are you not? A. Yes.

Q. Now, Mr. Baker, by the way, he was one of your confidential lawyers? A. Yes.

Q. You did not, between 1897 and 1905 carry property in your name at all, did you?

A. No, I did not.

Q. You put things out of your name sometimes, didn't you? A. Yes.

Q. Mr. Baker, about this Union Savings & Trust Company stock, which is the only block of stock of any moment which has passed out of your hands; that does not belong to the Union Savings & Trust Company, does it? A. No, it does not.

(Testimony of Charles H. Baker.)

Q. Then if your answer stated here that the Union Savings & Trust Company of Seattle were the owners of that stock, that answer was untrue, was it not?

A. From a technical sense, yes; it belongs to Mrs. Baker and they hold it for her.

Q. Your divorced wife? A. Yes.

Q. And there are other collaterals there, are there not?

A. There is no collaterals there, there are other securities.

Q. You have secured her in various ways besides that, have you not? A. Yes.

Q. You are a wealthy man, are you not?

A. I am fairly well fixed.

Q. You inherited a considerable sum of money from your father in 1904 or 1905; he died in 1903, and about 1905 you became, from time to time, the recipient of large dividends from his estate, did you not? [246—153c]. A. Yes.

Q. And you are to-day well off? A. Yes.

Q. Referring to Block 430, you got the contract to that land from the State of Washington in January, 1897, didn't you? A. Yes, sir.

Q. There was no litigation hanging over that in 1897? A. No.

Q. Now, Mr. Baker, you have spoken something about Mr. Simpson and his interest in those companies which you organized; you said something about that? A. Yes.

Q. They were the companies which belonged to your father, William T. Baker, of Chicago, were they

(Testimony of Charles H. Baker.)

not—I do not ask you to admit anything against any present contention of yours, but technically that is true? A. Technically that is true.

Q. I do not mean to have you state anything against your interests—but at one time they were known as the William T. Baker properties, were they not? A. Yes.

Q. Now, then, Sol G. Simpson never held more than one share of stock in any of those companies, did he? A. No.

Q. Either in the beginning or at any time afterwards, did he?

A. No. He held one qualifying share.” [247—153d]

The witness then stated that he took the title in the name of Algeron S. Norton, who was then his attorney, and in 1907 the property was transferred to the Seattle Water Front Realty Company. The witness testified that between 1897 and 1905 he did not carry any property in his own name. The witness testified that the sale to W. D. Hofius & Company was made through A. H. Anderson. The witness then identified a receipt under date of March 14, 1899, which was admitted in evidence and marked Plaintiff’s Exhibit 23, and which reads as follows: [248—153e]

**Plaintiff's Exhibit 23 [Receipt, Dated March 14,
1899, Chas. H. Baker to A. H. Anderson].**

SNOQUALMIE FALLS POWER COMPANY.

Chas. H. Baker, President.

Thos. T. Johnston, Chief Engineer.

J. J. Reynolds, Superintendent.

Primary Station—Snoqualmie Falls.

Central Distributing Station—Seattle.

Substations—Renton and Gilman.

Offices:

1009 Security Building,
Chicago.

Washington Building,
Seattle.

Seattle, Wash. Mch. 14, 1899.

\$1000.00

Recd. of A. H. Anderson \$100 in consideration of an option hereby given to him to purchase on or before Mch. 15th, 1899—for \$1000 cash the interest of this trust in Block 431 of Seattle Tide lands, subject to the contests upon same now pending, and further subject to the approval of the Comptroller of Currency. The receiver will prosecute to a conclusion the present actions of contest now pending.

CHAS. H. BAKER,

Receiver.

(Indorsed on back:)

I hereby assign my interest in the within option to
A. H. ANDERSON.

Recd. \$1000.00 from W. D. Hofius & Co. as per

(Testimony of Charles H. Baker.)

within option, in accordance with the conditions thereof.

C. H. BAKER,
Rec.

Mch. 15th. [249—154]

The witness stated that he forwarded letter of resignation to comptroller March 13, 1899, and that notwithstanding this he took up a transaction in remaining tide lands by letter of March 22, 1899, being Plaintiff's Exhibit 24; that this transaction, known as the Pigott and Hofius deal, was conducted by Mr. William Pigott, whom he knew very well and whom he met quite frequently. That he gave the option, Plaintiff's Exhibit 23, to Anderson on March 14. That he presumed Anderson was going to make a profit, and that Anderson was his intimate personal friend; that he himself executed the final papers before surrendering the trust to Judge Frater; that he himself as receiver actually received the money involved.

The witness then testified that if Anderson sold the property to Hofius & Company for \$1750, that Anderson made as commission \$750. The witness then testified that he had been accused of selling certain bonds to Anderson at a grossly inadequate price, and that an inspector came and investigated the whole matter. The witness testified that this \$1000 sale applied to the contested right in block 431. That blocks 432, 441, 443 and 444 were sold to Hofius & Company [250—154a] for \$2000. That these sales were likewise made through Anderson. That he did not know that Anderson had made anything on these

(Testimony of Charles H. Baker.)

sales, but had learned two or three days before the trial of this case that he had made \$3000. The witness testified that the reason he pushed through these sales just prior to his leaving the receivership was because he wanted the credit for them in his report, and that he did not know anything about any profit that Anderson was making.

There was then received in evidence a letter from Charles H. Baker to Charles G. Dawes, Comptroller of the Currency, bearing date March 22, 1899, marked Plaintiff's Exhibit 24, and reading as follows:

Plaintiff's Exhibit 24 [Letter, Dated March 22, 1899, Chas. H. Baker to Comptroller of Currency].

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER,

Receiver.

Office of Comptroller

Mar. 27, 1899,

of Currency.

Seattle, Wash., March 22nd, 1899.

Hon. Chas. G. Dawes,

Answered

Comptroller of Currency,

Mar. 27, 1899.

Washington, D. C.

Insol. Bks.

Dear Sir:—

Under a statute of the State the owner of upland real estate is entitled to purchase from the State under a ten-year contract certain contiguous tide land such as may be allotted by the State tide land commission. Under this right of upland ownership the trust has made contracts for the purchase of cer-

tain tide lands abutting at West Seattle and has made certain payments thereon with the exception of block 431, which has been in contest with other claimants. I have sold, subject to your approval, the trust's interest in block 431 for \$1000 cash. No payments of course have been made to the State as no contract for this has been issued. This is therefore an additional asset and when your Mr. Wing was here no value was set upon it. The other contracts I have sold subject to your approval for \$2000 cash. Certain payments have been made on them here below set forth, so you will observe that the trust [251—155] makes a good profit on this transaction. I have not held these properties at any higher figure than the trust's payments upon them, but there has been for several days some speculative interest in the property in question and there were three parties after it all about the same time. I do not know what the basis of the speculation is, but I submit these offers as the best that I could do, which I think highly satisfactory to the interests of the trust. The three contracts proposed to sell additional to the one hereinabove set forth are as follows:

Block 432, paid thereon	\$234.76	4 annual payments.
Block 441, paid thereon	203.77	“ “ “
Block 442, paid thereon	191.63	“ “ “

Total	\$630.16
-------	----------

Sale price, \$2000.

Net profit to the trust, \$1369.84.

\$1000 has been paid in escrow by W. D. Hofius & Co., with whom the transaction is made.

Yours respectfully,

CHAS. H. BAKER,

Receiver.

The above list should include the following also:

Block 443 paid thereon 76.05

“ 444 “ “ 11.89

87.94

There was then received in evidence a letter from Charles G. Dawes, Comptroller of the Currency, to Charles H. Baker, bearing date March 28, 1899, and marked Plaintiff's Exhibit 25, and which reads as follows:

**Plaintiff's Exhibit 25 [Letter, Dated March 28, 1899,
Comptroller of Currency to Chas. H. Baker].**

L.

B. F. B.

TREASURY DEPARTMENT,
Washington.

Office of
Comptroller of the Currency.

Address reply to
Comptroller of the Currency.

March 28, 1899.

Mr. Chas. H. Baker,
Receiver, Merchants' Nat. Bank,
Seattle, Wash.

Sir:—

I am in receipt of your letter of the 22nd instant,

in which you state that under the Statutes of the State of Washington, the owner of upland real estate is entitled to purchase from the State under a ten year contract certain contiguous tide land such as may be allotted by the State Tide Land Commission; that under this right of upland ownership the trust has made contracts for the purchase of certain tide lands abutting at West Seattle and has made certain payments thereon with the exception of block 431, which has been in contest with other [252—156] claimants, and that no payments have been to the state as no contract for this land has been issued, and therefore it is an additional asset upon which you have previously placed no value. You state that you have sold the other contracts, subject to the approval of the Comptroller, for \$2,000 cash, and that certain payments have been made upon them as shown in your letter. It is noted that these offers are the best you could obtain, and you regard them as “highly satisfactory to the interests of the trust.” The three contracts proposed to be sold in addition to No. 431 are stated by you as follows:

Block 432, paid thereon \$234.76 4 annual payments.

“ 441,	“	203.77 4	“
“ 442,	“	191.63 4	“

Total \$630.16

Sale price \$2,000, giving a net profit to the trust of \$1,369.84; and further that \$1,000 has been paid in escrow by W. D. Hofius & Co. with whom the transaction was made. You further state that the above

(Testimony of Charles H. Baker.)

should include the following:

Block 443, paid thereon, \$76.05

Block 444, paid thereon, 11.89

\$87.94

The transaction as presented by you appears to be for the interests of the trust, and if you and the representative interests of your trust are satisfied that this is for the best interests of the creditors, and the best proposition you can obtain, you are authorized to petition the court for an order to sell upon the terms stated in your letter of the 22nd instant.

Very respectfully,

(Signed) CHARLES G. DAWES,
Comptroller.

Redirect Examination.

Q. (Mr. GROSSCUP.) This sale through Anderson to Hofius and Pigott was not finally consummated by you, that is there was something more to be done by Judge Frater afterwards?

A. I believe it was.

Q. Is that the matter, do you know, about which Judge Frater testified that he consulted with L. C. Gilman? A. Yes, sir, that is the matter.

Q. There appears upon page 307 of the journal the following entry: "June 4," under the general column of 1899, "Additional assets good Blocks 395, 396, 431, 866, 730 tide-land contracts." Opposite that "\$1644.-15" in figures. In view of that entry, Mr. Baker, would you be certain that the entire amount of money paid by Pigott and Hofius in that transaction was

(Testimony of Charles H. Baker.)

paid to you, [253—157] or might it not have been paid to Frater afterwards?

A. Part of it was paid to Judge Frater.

The witness then stated that Mr. Simpson was connected with the Snoqualmie Falls Power Company and the consolidation of the street-car lines in Seattle and had a substantial contingent interest with the witness in these enterprises.

The witness also testified that Columbus Tyler was dead. That Columbus Tyler assisted in making out the quarterly reports.

Q. In your cross-examination, Mr. Baker,—in your direct examination, I called your attention to the examination made of your trust by Mr. Seeley; during or at the conclusion of that examination who gave directions to your counsel for the preparation of the order of the Court? A. Mr. Seeley did.

Q. Who were your counsel at that time?

A. Stratton, Lewis & Gilman.

Q. And Mr. Seeley says in his report substantially that all the assets of this bank, "The receiver is proceeding under the authority given him by you to exchange real estate holdings of the trust for receiver's certificates. The disposition of real estate in this manner is to the interest of the creditors of the trust. From one to five hundred per cent more can be obtained for such assets than if disposed of at a private or public sale." Was that matter called to your attention in connection with the preparation of this report, or did you and Mr. Seeley discuss it?

A. What matter?

(Testimony of Charles H. Baker.)

Q. The matter of exchanging the assets for receiver's certificates.

A. Why, he called my attention to it.

Q. Mr. Seeley says, "The remaining assets are practically bad and doubtful, from which in my judgment more can be obtained by compromise and private sale than through an [254—158] attempt to enforce collection and their disposal at public auction." Was it upon Mr. Seeley's conclusion and report that your petition to the Court and the Court's order thereafter was based for the sale of bad and doubtful assets. A. It was.

Q. And did you understand or did you not understand, in view of this report of Mr. Seeley and the order which he obtained, that that included all the remaining assets of the trust?

A. That included everything that was left.

Q. And did you act upon that conclusion?

A. I did.

Q. At that time? A. Yes.

Q. It appears from the letter which Mr. Bausman called attention to that you, in your letter to the comptroller possibly did not fully agree with Mr. Seeley in this respect, is that correct, or is it not; that is you say, there there is some prospect of an improvement in your letter, or words to that effect?

A. Yes.

Q. But you acted upon the examiner's report and what he did with respect to the petition for this sale?

A. Yes.

Q. During your entire receivership was there a dispute between you and the department respecting

(Testimony of Charles H. Baker.)

your liability upon this ten thousand dollars note?

A. No, there was not.

Q. Well, there was a discussion about it, whether you owed anything on it or not?

A. Yes, there was.

Q. And when the department finally concluded that that was a matter that ought to be prosecuted, you resigned? A. Yes.

Q. Did the department ever bring any action on that note through Mr. Frater or otherwise?

A. No, they never did.

Q. This Pigott and Hofius check, do you know from whom the money came to you, that payment of two thousand dollars and one thousand dollars?

A. I do not remember. I thought it came from Anderson; I don't know, though [255—159]

Q. Now, did you know, Mr. Baker, at that time and for some considerable time afterwards that Mr. Anderson was making some profit out of this transaction?

A. I did not know that he was making any profit until last fall when I was here.

Q. Did you know whether or not in this deal that Anderson made with Hofius and Pigott #429 was included by Mr. Simpson? A. I do not know.

Q. You did not know? A. No.

Q. Do you know whether or not the price that Hofius and Pigott paid included a consideration to Mr. Simpson for #439—you did not know that?

A. No, I did not know.

Q. Now, coming to the matter of your answer in this case. When you originally employed me as your counsel in this case, where were you?

(Testimony of Charles H. Baker.)

A. I was in Panama.

Q. And you communicated with me here?

A. Yes.

Q. When the answer was prepared and filed, were you in Seattle? A. No, I was not.

Q. Your attention has been called to certain inaccuracies in that answer, one of which is that I stated in the answer that you bought this property from Mr. Simpson on the open market; you have testified on cross-examination that you think that is an inaccuracy. What is your understanding of "the open market" in connection with your answer on this cross-examination?

A. The open market is where property is listed and known to be for sale.

Q. Suppose that it was in my mind and it would be a fact that the open market is any sale of property that can be purchased or bought; would you say then that this was an inaccuracy in my answer, that being the legal effect of those terms.

A. It might be the legal effect.

Q. In other words, in your cross-examination, you did not intend to criticize my use of those words, in view of the facts? A. No. [256—160]

Q. Now, Mr. Baker, did you at any time in connection with this answer, see it until you came here sometime the latter part of September last?

A. No, that was the first time I saw it.

Q. You and I were very busy in the litigation in Chicago? A. Yes.

Q. Involving the settlement of your father's estate.

Q. Did you or did you not hear me, at the time that

(Testimony of Charles H. Baker.)

your deposition was taken in September, tell Mr. Bausman that there would be a correction in the answer in respect to when you contracted to buy this property? A. Yes.

Q. Or Mr. Goodale,—I think possibly was present.

A. Yes, I heard you say it.

Q. You heard me give them notice in that respect?

A. Yes, I did.

Recross-examination.

Q. (Mr. BAUSMAN.)—Just a question or two in recross-examination. Before the answer was filed here in Seattle you had conferences in Chicago with Mr. Grosscup about it, did you not? A. Yes.

Q. And you told him your best recollection of the affair at that time, didn't you? A. Yes.

Q. And that was before you saw, I believe, this railroad letter? A. Yes.

Q. Just one more question. Counsel asked you whether you understood from Mr. Seeley, the examiner, and the order of Court which he had obtained about selling bad and doubtful assets; whether you understood from that that you were to sell all the remaining assets of the trust?

A. That was my understanding.

Q. In view of that, I will direct your attention to Plaintiff's Exhibit No. 5, and I will ask you what your understanding is of the following; it is a letter dated October 29, 1897, in which you start out—I will read it to you—"I am in receipt of your favor of the 18th relating to the report of Mr. Seeley, examiner, upon the condition of this trust," and so on—

(Testimony of Charles H. Baker.)

that was acknowledging Mr. Seeley's report and order, wasn't it? [257—161]

A. Who is that letter to?

Q. That is the Comptroller of the Currency.

A. Yes.

Q. Now though you testified here that you were to sell all the remaining assets of this trust, you concluded, after saying that real estate has been rising, you use this language: "Appearances now indicate that the most active period of the trust, second only to the first six months of its life, will soon occur and I anticipate that some of the slowest of the assets can be handled to advantage and considerable cash realized. The widespread advertising given to this particular section on account of the Klondike gold excitement and the consequent impetus given to trade and immigration here, will soon prove a factor of profit to the trust not considered in making the estimate."

You wrote that letter after he had gotten that order? A. Yes.

Mr. KELLEHER.—I want to ask a few questions.

Q. (Mr. KELLEHER.) There was an inadvertence made in your statement, and I don't want you intentionally to make it. Now, looking at this receipt for a thousand dollars for the interest in block 431, it is in your handwriting, is it not, when you closed with Hofius & Company for the rights in block 431 (showing)? A. Yes.

Q. You receipted for that thousand dollars on the 15th of March? A. Yes.

Q. And you closed that transaction with Hofius or

(Testimony of Charles H. Baker.)

Pigott—I think you said Pigott? A. Yes.

Q. Pigott gave you a check for that thousand dollars? A. Yes, I think he did.

Q. You say you do not know how much he paid to Anderson? A. I do not.

Q. Now, following that, and coming to the sale of the other five blocks following, I will call your attention to journal page 306 and ask you to look at this entry of two thousand dollars “Additional assets good. Sale of Seattle tide-lands contracts 729, 730, 396, 866, 395, to W. D. Hofius & Co. \$2,000.” That was the amount which you agreed to sell that for to Hofius and Pigott?

A. To Anderson, and he turned it over to Hofius.
[258—162]

Q. But you received two thousand dollars and turned it in in your report? A. Yes.

Q. And you understood that was the full purchase price? A. Yes.

Q. That the estate was getting? A. Yes.

Q. And you so reported it to the comptroller?

A. Yes.

Q. In pursuance to that you executed an assignment of these contracts, and to refresh your recollection I will call your attention to Defendants’ Exhibit “T”—to refresh your recollection look at the date, 14th of April, 1899 (showing)—“To block 441,” signed on the date of the 14th of April, is it not?

A. Yes.

Q. And acknowledged by you before a notary public on the same day? A. Yes.

(Testimony of Charles H. Baker.)

Q. That was a day or two before you went out of office? A. Yes.

Q. You received this two thousand dollars and got full consideration which you understood was going to the trust for those five blocks? A. Yes.

Q. And you turned those contracts over to Hofius and Pigott and got the two thousand dollars?

A. Yes.

Q. And your recollection, you stated on your direct examination, was that you got a check from Hofius or from Pigott rather, for that two thousand dollars? A. Yes.

Q. Now, you do not mean to say to the Court that you understand now that Pigott afterwards paid the trust a day or two later some additional money for those five blocks, do you?

A. To Mr. Frater, you mean?

Q. Yes, to your successor—you do not mean to say that now to the Court, that Mr. Pigott, when you got authority to sell him this for two thousand dollars, afterwards [259—163] paid any more money to your successor, after he had gotten these contracts from you?

A. Well, I only know what the books say.

Q. All you mean is that you see something on page 307 after you closed your books, in someone's handwriting, either you or Mr. Hill's—that is all the information that you have, is it not?

A. That is all I know.

Q. And you do not mean to say, as a bookkeeper, that they received any additional money—that Mr.

(Testimony of Charles H. Baker.)

Frater received any additional money—you do not want the court to so understand you?

A. This is after I went out, is it?

Q. Yes. A. Well. I did not receive that.

Q. And you do not mean to say that you, as a bookkeeper—you do not mean to say that this shows that he did receive other money for those five blocks that went to the trust?

A. Well, I am not a bookkeeper for one thing, and I am not familiar with this matter for another thing.

Q. Really, in fact you do not know what this means, do you—you do not know what the entry is there for? A. I do not believe I do.

Q. And that is all the information that you have about it? A. Simply that it is in the book.

Mr. GROSSCUP.—Now as to these checks received; do you know whether it was the Anderson check or the Hofius check or Pigott's check, or whose it was?

A. I don't think I do. Mr. Hill can tell you that; he collected the checks.

[Testimony of William Pigott, for Plaintiff.]

WILLIAM PIGOTT was produced as a witness on behalf of the plaintiff.

The plaintiff introduced in evidence a certified copy of the document from the office of the clerk of the Superior Court of King County showing that there had been a contest [260—164] upon block 431. This was received in evidence and marked Plaintiff's Exhibit 26.

The witness then stated that he had resided in

(Testimony of William Pigott.)

Seattle since 1895, and is by occupation a manufacturer, being connected with the Seattle Car & Foundry Company, and engaged in the iron and steel business. That he is vice-president of the Pacific Coast Steel Company.

The witness testified that he remembered the purchase of the contested rights of the Merchants' National Bank to certain lots in block 431 from Charles H. Baker, receiver, the purchase being made in March 1899. That he paid about March 16 for these contested lots in block 431 \$1700 or \$1750. The witness stated that he did not now remember who first offered the property to him. That all that he now remembers is that it was brought to his notice that the land was for sale, and that Mr. Anderson had an option on it and that his business was transacted with Anderson. That he paid the purchase price in two checks—one was for \$1000 to Mr. Baker, and one was for \$750 to Mr. Anderson. The witness stated that about the same time as this purchase—within thirty or sixty days thereafter—he had purchased some more tide lands from Mr. Anderson. That after he purchased a portion of block 431 he began to look around to see if there was any other tide lands for sale. That he met Simpson and Anderson every few days and that he presumed the subject came up as a matter of gossip. The witness stated that he made an offer for certain tide lands at West Seattle. That he made the offer either to Mr. Simpson or to Mr. Anderson. That the price finally agreed upon was \$5000 for blocks 429, 443,

(Testimony of William Pigott.)

444, and a part of 432, 441 and 442. That this payment was made in December, 1899, and was a lump sum for the six blocks. The witness then identified [261—165] a check for \$5000 as being the check which he gave for these blocks, and the same was received in evidence and marked Plaintiff's Exhibit 27.

The witness stated that for several years after this purchase, which was in December, 1899, he tried to buy from Simpson and Baker block 430. That commencing immediately after this purchase he tried for two or three years to make the purchase of block 430, going first to Mr. Baker. The witness stated that Mr. Baker said he could not sell it and referred the witness to Mr. Simpson as the owner of the property. The witness further stated that Mr. Baker did not say that he had any interest in the property.

Mr. KELLEHER.—How many years after 1899, as nearly as you can recollect, was it after April, 1899?

A. Well, I really can't remember, but I kept pressing him for the purchase of that lot, beginning shortly after the first transaction, for probably two or three years.

Q. Pressing whom?

A. Everybody that I thought had anything to do with it.

Q. And who were those people that you did press that you thought had something to do with it?

A. Well, there was Mr. Simpson, Mr. Anderson and Mr. Baker.

(Testimony of William Pigott.)

Q. You cannot tell how soon after April, 1899, this first talk was with Mr. Baker; was it a year, do you think? A. I should imagine.

Q. About a year after April, 1899? A. Yes.

Q. Then did you go to Mr. Simpson?

A. I went to Mr. Simpson.

Q. About the purchase of this block? A. Yes.

Q. What did he say the first time about this, what was [262—166] the conversation between you as to the purchase of this at that time?

A. Well, his conversation, as nearly as I can remember it, was, that there were others interested in it.

Q. Did he say who those were? A. No.

Q. What else did he say?

A. That he was not in a position to offer it for sale.

Q. Did you see him afterwards? A. Yes.

Q. And what were the subsequent talks along that line—did you ever get a price out of him?

A. I did later.

Q. About when?

A. I would think it was a year later than that again.

Q. What price did you get; what was the talk?

A. He made me a price of thirty thousand dollars.

The COURT.—When was that—what year?

A. Well, it was no earlier than two years from the first transaction, and possibly it might have been within three years.

(Testimony of William Pigott.)

Q. Did he ever tell you in any of those conversations the name of any person that had an interest in that block other than himself? A. No, sir.

Q. Did you ever have any other talk with Baker about it?

A. I don't remember; I think probably I did.

Q. Did you ever learn from him who owned the block? A. No, sir.

Q. You never did find out in those different conversations between the two of them who owned the property? A. No, sir.

Q. It was a mystery to you at all times?

A. Yes, sir.

Q. You tried to find the ownership?

A. Yes. [263—167]

Q. And you were not successful? A. No, sir.

Q. And you tried it for years? A. Yes.

The COURT.—I see that block 431 is marked with a cross down there on the exhibit, and this map that I have here includes a great deal more.

Q. (Mr. KELLEHER.) What were the lots which you bought in block 431 from the bank?

A. Lots 34 to 49.

Q. That is what you paid the \$1750 for.

A. Yes.

Cross-examination.

Q. (Mr. SHANK.) Mr. Pigott, I notice that this check of W. D. Hofius & Company is signed by W. D. Hofius. When did Mr. Hofius die?

A. Two years ago, I think—two years ago this spring.

(Testimony of William Pigott.)

Q. Mr. Hofius, up to the time of his death, and you up to the present time, have continued to reside in Seattle? A. Yes.

Q. You have been a member of the school board of the city of Seattle for how long a time?

A. Three years and a half.

Q. You have resided in Seattle how long?

A. Eighteen years.

Q. The deal or purchase that you made for five thousand dollars covered by this check to A. H. Anderson and S. G. Simpson, included block 429, did it not? A. Yes, sir.

Q. That is the block that was owned by S. G. Simpson at that time? A. Yes.

Q. (By the COURT.) Who made this price of thirty thousand dollars to you—Simpson or Baker?

A. Mr. Simpson.

Q. You did not have any conversation with Mr. Simpson [264—168] prior to 1899 about this property? A. Prior to 1899?

Q. Yes.

Mr. GROSSCUP.—Prior to the time you purchased the lots which you testified about in block 431?

A. No, not prior to that, no, sir.

**[Testimony of Charles H. Baker, for Defendants
(Recalled).]**

CHARLES H. BAKER was recalled and testified that he never received, nor did Mr. Simpson account to him for the \$1211.20 which Mr. Simpson received

(Testimony of Charles H. Baker.)

from the Seattle and San Francisco Railroad Company in August, 1903, for the thirty-foot right of way across block 430.

The plaintiff then offered in evidence a petition under date of July 19, 1897, signed by Charles H. Baker, praying the Judge of the United States District Court for an order permitting him to accept \$25.00 in cash for a quitclaim deed and assignment of all the right, title and claim whatsoever of the Merchants' National Bank and the receiver to blocks 395, 396, 397, 398, 403, 404, 405, 409, 394, 399 and 402 of Seattle Tide Lads, upon which an application by the Merchants' National Bank had been filed, which said petition was admitted in evidence and marked Plaintiff's Exhibit 28.

The plaintiff also offered in evidence the order of C. H. Hanford, Judge of the United States District Court, under date of July 20, 1897, as prayed for, which said order was received in evidence and marked Plaintiff's Exhibit 29. [265—169]

The plaintiff then offered in evidence a letter from Charles H. Baker, receiver, under date June 17, 1897, to James H. Eckles, Comptroller of the Currency, which was admitted in evidence, marked Plaintiffs' Exhibit 30, and reads as follows:

**Plaintiff's Exhibit 30 [Letter, Dated June 17, 1897,
Chas. H. Baker to Comptroller of Currency.]**

No. 2985.

THE MERCHANTS' NATIONAL BANK.

CHAS. H. BAKER.

Receiver.

Answered

Jun. 24, '97.

Org. Div.

Office Comptroller

Jun. 23, 1897,

of Currency.

Seattle, Wash. June 17—97

Hon. James H. Eckels,

Comptroller of Currency,

Washington, D. C.

Dear Sir:

By virtue of being a shore owner of upland property this bank is entitled to the prior right to purchase certain tide lands from the state. I have as you have been advised, completed the contracts for purchase of such lands as were awarded to the trust by the Tide Land Commission. The bank's application to purchase was rejected by the Commission on the following other described lands: Blocks 395—396—397—398—403—404—405—409—394—399 and 402 of Seattle Tide Lands. Under the law I may appeal to the courts and my attorneys think such appeal would be useless on the above, although on one other block I have taken an appeal. I am offered \$25.00 cash for a relinquishment of the trust's rights in the above, or \$100 contingent upon winning, by an attorney who thinks he can make something by taking up the appeals. I consider the

asset valueless and would accordingly recommend the acceptance of either alternative offer.

Very respectfully,

CHAS. H. BAKER,

Rec. [266—170]

The plaintiff then offered in evidence a letter from James H. Eckels, Comptroller of the Currency, to Charles H. Baker, receiver, under date of June 24, 1897, which letter was admitted in evidence, marked Plaintiff's Exhibit 31, and reads as follows:

**Plaintiff's Exhibit 31 [Letter, Dated June 24, 1897,
Comptroller of Currency to Chas. H. Baker.]**

TREASURY DEPARTMENT.

Washington, June 24, 1897.

Office of
Comptroller of the Currency.

Address Reply to
Comptroller of the Currency.

M. L. C.

E. S.

Mr. Charles H. Baker,

Receiver, Merchants' National Bank,
Seattle, Washington.

Sir:

Your letter of the 17th instant is received, in reference to the interests of your trust in certain tide lands, and in view of your statement, you are hereby authorized to accept the offer of \$25 for a relinquishment of any rights you may have in the property or \$100 contingent upon the favorable result of an appeal to the court; the application of the bank to

purchase the lands, it being a shore owner, having been rejected.

Very respectfully,
(Signed) JAMES H. ECKELS,
Comptroller.

The plaintiff then offered in evidence the petition of the receiver, Charles H. Baker, under date of April 4, 1899, praying the Judge of the United States District Court for an order authorizing the receiver to sell and dispose of all of Lots 1 to 16 and 11 to 17, inclusive, Block 441, as shown on page 51, Vol. 2, Map of Seattle Tide Lands, filed in the office [267—171] of the Board of State Land Commissioners at Olympia, Washington, on the 15th day of March, 1895. All of Lots 3, 4, 5, 6, 9, 10 and 11, Block 443, as shown on page 52 of the Map of Seattle Tide Lands, filed with the Board of State Land Commissioners at Olympia, Washington, on the 15th day of March, 1895. All of Lots 1, 2, 3, 4, 5, 6, 7, 8, 13, 14, 15, 16, 17, 18, 19, and 20, Block 432, according to survey thereof as shown on the Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Washington, on the 15th day of March, 1895. All of Lots 13 to 18, inclusive, Block 444, according to the survey thereof as shown on page 53, Vol. 2 of Map of Seattle Tide Lands, filed in the office of the Board of State Land Commissioners at Olympia, Washington, on the 15th day of March, 1895. A portion of Block 431, according to the survey thereof, as shown on the Map of Seattle Tide Lands. The said sale to be made for the sum of \$3000, the petition setting forth that the petitioner

had received a proposition from W. D. Hofius to purchase the property for that sum.

The petition was admitted in evidence and marked Plaintiff's Exhibit 32.

An order dated April 26, 1899, in accord with the prayer of the petition was received in evidence and marked Plaintiff's Exhibit 33.

**[Testimony of A. W. Frater, for Plaintiff
(Recalled).]**

A. W. FRATER was recalled as a witness on behalf of the plaintiff and testified that he did not receive any of the consideration paid by Hofius and Pigott as the purchase price of blocks 443, 442, 441 and 432, and that he had nothing to do with that transaction.

On cross-examination the witness stated that he remembered distinctly receiving a letter from the Comptroller of the [268—172] Currency directing him to make an entry in the books of the receivership relating to some \$1500 or \$1600 the exact amount the witness did not remember. That there seemed to be some error with reference to this item, and the comptroller wanted an entry made in the books to correct it, and the witness stated that he remembered distinctly that the entry was made pursuant to the letter received from the Comptroller of the Currency. The witness stated that the letter told just how to make the entry.

**[Testimony of J. W. Schofield, for Plaintiff
(Recalled).]**

J. W. SCHOFIELD was recalled as a witness on behalf of the plaintiff, and, after being shown page 307 of the journal, stated that the entry was a memorandum entry only. That the item did not mean cash at all, and that this was shown upon the face of it. That it was simply an additional charge to the receiver to correct a previous entry.

On cross-examination the witness, in reply to a question as to whether the item may not have been discovered by someone examining the books, stated that it did not, for the reason that if the department had so found it, it would have removed the receiver from his trust very expeditiously. That if the department found an \$1800 deficiency in the accounts of a receiver, his head goes off. [269—173]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, Receiver,

Plaintiff,

vs.

CHARLES H. BAKER et al.,

Defendants.

Order Approving Statement of Evidence.

I, Jeremiah Neterer, Judge of the above-entitled court and the Judge before whom the above case was

tried, do hereby certify, the plaintiffs and the defendants being represented by their respective counsel in open court, that the foregoing is a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendants from the judgment entered herein against the defendants and in favor of the plaintiffs; and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of said appeal. All original exhibits to be transmitted to the Appellate Court.

Done in open court this June 17, 1914.

JEREMIAH NETERER,

Judge.

Approved:

BAUSMAN.

SHANK.

[Indorsed]: Filed in the U. S. District Court, Western District of Washington. June 17, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

[270]

**[Order Extending Time to Prepare, etc., Transcript
of Record on Appeal to July 6, 1914.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1.

JOHN W. SCHOFIELD, as Receiver of
MERCHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Now on this 22d day of June, 1914, upon motion
of attorneys for defendants, and for sufficient cause
appearing, it is ordered that the time within which
the Clerk of this court may prepare, certify and
transmit to the United States Circuit Court of Ap-
peals the transcript of the record in this cause be,
and the same is hereby extended to and including the
6th day of July, 1914.

JEREMIAH NETERER,
District Judge.

[Indorsed]: Order. Filed in the U. S. District
Court, Western Dist. of Washington. June 22, 1914.
Frank L. Crosby, Clerk. Ed M. Lakin, Deputy.
[271]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the
MERCHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Citation [on Appeal (Copy).]

United States of America to John W. Schofield, as
Receiver of the Merchants' National Bank of
Seattle, Greeting:

You are hereby notified that in the above-entitled proceeding had in said United States District Court for the Western District of Washington, Northern Division, an appeal has been allowed to the said defendants to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in said cause, and you are therefore hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, on or before the 26th day of June, A. D. 1914, to show cause, if any there be, why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable JEREMIAH NETERER,
Judge of said court, this 27th day of May, A. D.
1914.

JEREMIAH NETERER.

Service of the foregoing Citation admitted this 4th
day of June, 1914.

[Seal] BAUSMAN, KELLEHER, OLDHAM
& GOODALE,

Attorneys for John W. Schofield, Receiver of Mer-
chants' National Bank of Seattle. [272]

[Indorsed]: In Equity—No. 1. United States
District Court for the Western District of Washing-
ton, Northern Division. John W. Schofield, as Re-
ceiver of the Merchants' National Bank, Plaintiff,
vs. Charles H. Baker et al., Defendants. Citation.
Filed in the U. S. District Court, Western Dist. of
Washington. June 9, 1914. Frank L. Crosby,
Clerk. By E. M. L., Deputy. Corwin S. Shank, H.
C. Belt, B. S. Grosscup and W. C. Morrow, Attor-
neys for Defendants, Alaska Building, Seattle.
[273]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1.

JOHN W. SCHOFIELD, as Receiver of MER-
CHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Praeipice of Defendants for Record.

To Frank L. Crosby, Clerk of Said Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the 9th Circuit at San Francisco, a type-written transcript of the record upon appeal in the above-entitled cause containing the following portions of the record in the above-entitled cause, to wit:

1. Second Amended Complaint.
2. Answer of C. H. Baker to Second Amended Complaint.
3. Answer of A. S. Norton to Second Amended Complaint.
4. Amended Answer of Seattle Water Front Realty Company to Second Amended Complaint.
5. Memo. Decision of the Court.
6. Decree.

7. Petition for Appeal.
 8. Assignment of Errors.
 9. Order Allowing Appeal and Fixing Supersedeas Bond.
 10. Appeal and Supersedeas Bond.
 11. Citation.
 12. Statement of Evidence.
 13. Praecipe of Defendants for record on appeal.
- Dated Seattle, Washington, June 4, 1914.

B. S. GROSSCUP,
CORWIN S. SHANK,
W. C. MORROW,
H. C. BELT,

Attorneys for Defendants. [274]

Copy of the within Praecipe received and due service of same acknowledged this 4th day of June, 1914.

BAUSMAN & KELLEHER,
OLDHAM & GOODALE,

Attorneys for Plaintiff.

[Indorsed]: Praecipe of Defendants for Record. Filed in the U. S. District Court, Western Dist. of Washington. June 9, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [275]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 1.

JOHN W. SCHOFIELD, as Receiver of MER-
CHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the 279 typewritten pages, numbered from 1 to 279, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the Western District of Washington, to

the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the defendants for the preparation and certification of the typewritten transcript of [276] record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of record—780 folios @ 30c.....	\$234.00
Certificate of Clerk to typewritten transcript of record—3 folios.....	.90
Seal to said Certificate.....	.40
	<hr/>
	\$235.30

I hereby certify that the above cost for preparing and certifying record amounting to \$235.30 has been paid to me by Messrs. Grosscup, Shank, Morrow and Belt, attorneys for defendants.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 23d day of June, 1914.

[Seal]

FRANK L. CROSBY,
Clerk. [277]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN EQUITY—No. 1.

JOHN W. SCHOFIELD, as Receiver of the
MERCHANTS' NATIONAL BANK OF
SEATTLE,

Plaintiff,

vs.

CHARLES H. BAKER, ALGERNON S. NOR-
TON and SEATTLE WATER FRONT
REALTY COMPANY, a Corporation,
Defendants.

Citation [on Appeal (Original).]

United States of America to John W. Schofield, as
Receiver of the Merchants' National Bank of
Seattle, Greeting:

You are hereby notified that in the above-entitled proceeding had in said United States District Court for the Western District of Washington, Northern Division, an appeal has been allowed to the said defendants in the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in said cause, and you are therefore hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, on or before the 26th day of June, A. D. 1914, to show cause, if any there be, why the said final decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NET-

ERER, Judge of said court, this 27th day of May,
A. D. 1914.

[Seal]

JEREMIAH NETERER,

Judge.

Service of the foregoing citation admitted this
4th day of June, 1914.

BAUSMAN, KELLEHER, OLDHAM &
GOODALE,

Attorneys for John W. Schofield, Receiver of Mer-
chants' National Bank of Seattle. [278]

[Endorsed]: In Equity—No. 1. United States
District Court for the Western District of Washing-
ton, Northern Division. John W. Schofield, as Re-
ceiver of the Merchants' National Bank, Plaintiff,
vs. Charles H. Baker et al., Defendants. Citation.
Filed in the U. S. District Court, Western Dist.
of Washington. Jun. 9, 1914. Frank L. Crosby,
Clerk. By E. M. L., Deputy.

[Endorsed]: No. 2438. United States Circuit
Court of Appeals for the Ninth Circuit. Charles H.
Baker, Algernon S. Norton and Seattle Water Front
Realty Company, a Corporation, Appellants, vs. John
W. Schofield, as Receiver of the Merchants' National
Bank of Seattle, Appellee. Transcript of Record.
Upon Appeal from the United States District Court
for the Western District of Washington, Northern
Division.

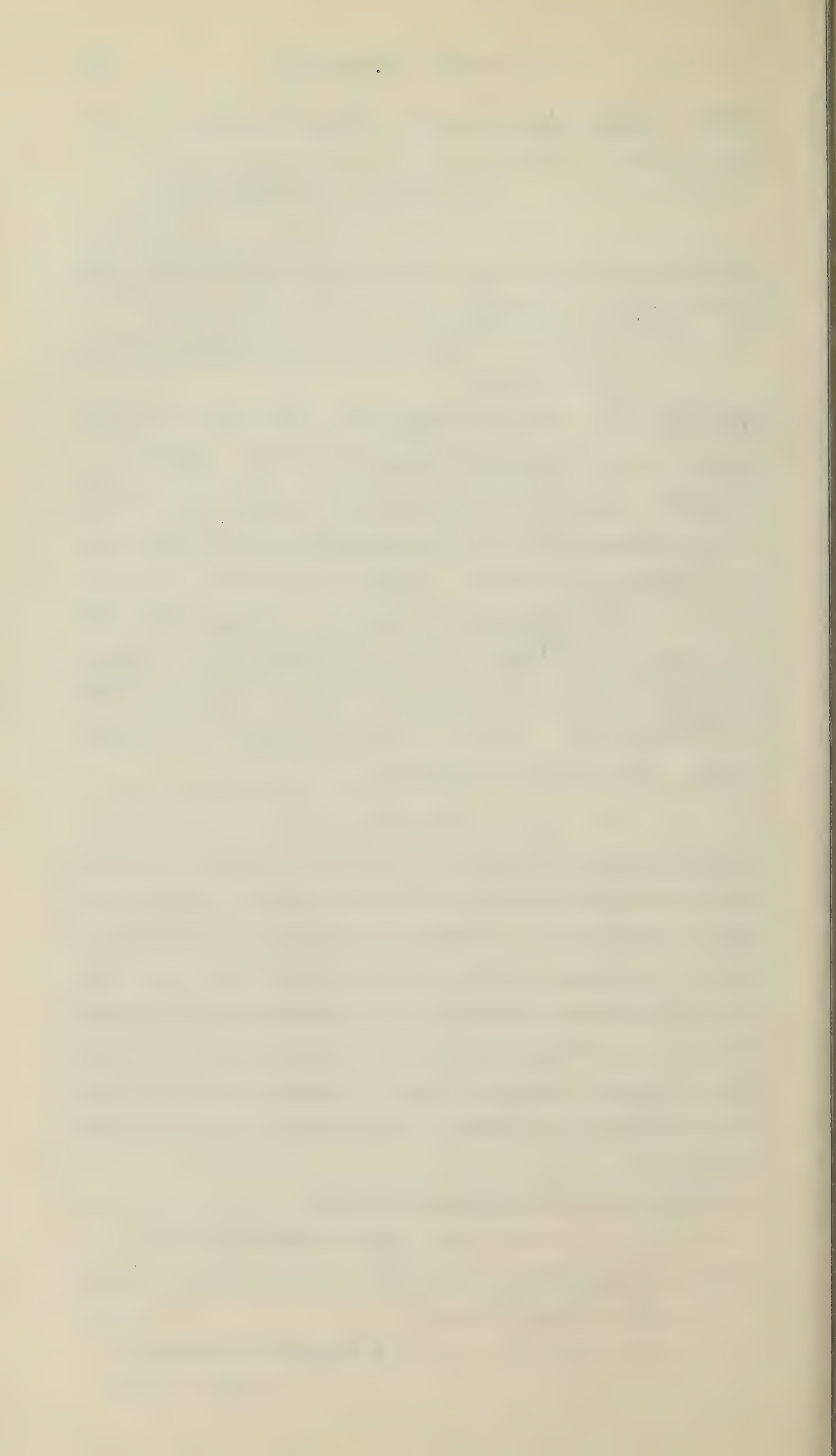
Received and filed June 26, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.



**IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHARLES H. BAKER, ALGERNON S. NORTON
and SEATTLE WATER FRONT REALTY
COMPANY, a corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the Mer-
chants' National Bank of Seattle,

Appellee.

BRIEF OF APPELLANTS

**Upon Appeal from the United States District Court
for the Western District of Washington
Northern Division.**

B. S. GROSSCUP,
W. C. MORROW,

Bank of California Building,
Tacoma, Washington.

CORWIN S. SHANK,
HORATIO C. BELT,

Alaska Building,
Seattle, Washington.

Solicitors for Appellants.

NO. 2438

**IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CHARLES H. BAKER, ALGERNON S. NORTON
and SEATTLE WATER FRONT REALTY
COMPANY, a corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the Mer-
chants' National Bank of Seattle,

Appellee.

BRIEF OF APPELLANTS

**Upon Appeal from the United States District Court
for the Western District of Washington
Northern Division.**

INTRODUCTION.

This is an action brought by the receiver of a national bank to declare a trust arising out of a transaction, now claimed by the receiver to have been fraudulent, and occurring more than sixteen years ago. There were six principal witnesses to the trans-

action—being the appellant Charles H. Baker, Receiver, now living; Sol G. Simpson, purchaser, dead; A. H. Anderson, agent, dead; Wm. L. Seeley, special examiner for the Comptroller of the Currency, dead; Columbus T. Tyler, bookkeeper, who made out the report of the receiver reporting to the Comptroller the sale to Simpson, dead; W. D. Hofius, purchaser of all the tide lands of the receivership other than block 430, dead.

STATEMENT OF ISSUES FRAMED BY PLEADINGS.

The second amended bill of complaint in this action contains the most general allegations and are in substance as follows:

That in June, 1895, the appellant Baker was appointed receiver of the Merchants' National Bank of Seattle, continuing as such receiver until April, 1899, when he resigned, and A. W. Frater, of Seattle, was appointed receiver and so continued until February, 1913, when the present receiver, John W. Schofield, a national bank examiner, was appointed.

That among the assets that came into the hands of receiver Baker were certain preference rights to purchase certain tide lands in King County, Washington, which preference rights arose from the fact

that the insolvent bank owned certain uplands, and giving the receiver this right by reason of such upland ownership. That among these preference rights was the right to purchase block 430, which it is alleged is now worth \$300,000.

The bill further alleges that the comptroller of the currency authorized the purchase of the tidelands, and that the appellant Baker, as receiver, thereafter entered into a contract with the State of Washington for the purchase of the same, and made several installment payments thereon. That proper officials of the state issued a contract to receiver Baker, and the said contract provided "upon payment in full of the consideration named in said contract, the State of Washington would issue to the Merchants' National Bank of Seattle, or its assignee, its deed in fee simple to said tidelands."

The bill further alleges that on November 26, 1897, Baker, while acting as receiver, purported to convey and assign this contract, without actual consideration, to one Sol G. Simpson.

It is further alleged that, in order to conceal the assignment of the contract and to disguise its general nature, the appellant Baker, as receiver, on October 6, 1897, petitioned the United States Court in "vague and general terms" for leave to sell cer-

tain assets of the trust, and that an order was made purporting to authorize the receiver to sell the assets at private sale, or otherwise. The bill further alleges that this assignment was made by receiver Baker to Sol G. Simpson "for Baker's own use, without the knowledge or consent of the Comptroller, and for the purpose of secretly defrauding said insolvent bank, its creditors and stockholders, and said Simpson, during all the time that he held, or purported to hold, title to said property, held the same in trust for said Baker," (Tr. p. 7). That this sale to Simpson embraced blocks 429 and 430—the same having been made to Simpson as a part of one and the same transaction. It is not claimed, however, by the bill, or during the course of the evidence, that the fraudulent features of the transaction attached to any other than block 430. The bill further alleges that Baker from time to time advanced to and reimbursed Simpson such sums as were required to pay the balance of the purchase price remaining due the State.

The bill further alleges that, as a part of this fraudulent scheme, appellant Baker secretly and for the purpose of defrauding the bank, caused the State of Washington to issue to Simpson harbor area lease No. 181, being for the harbor area lying in

front of and adjacent to block 430, and that Simpson never did have any interest in this lease, but held the same at all times thereafter, and until 1905, in trust for Baker, and subject to his control. (Tr. pp. 7, 8.)

The bill further alleges that in 1905, Baker caused Simpson to convey to Algernon S. Norton, Baker's legal advisor in the State of New York, the contract of purchase, and that thereafter in 1907, Baker caused to be incorporated the appellant Seattle Water Front Realty Company, and had Norton and wife convey the said land to the said Realty Company.

The said bill, as a justification for the sixteen years' delay in bringing this action, makes the following allegation:

"The facts herein alleged were wholly unknown to any of the creditors and stockholders of said bank, and to plaintiff and the Comptroller of the Currency until the year 1913, and were, until that time, concealed from them by the defendants, as above set forth, and were first discovered by the Comptroller of the Currency on or about the 1st day of February, 1913," (Tr. p. 12).

The bill then prays that the appellants be decreed to hold said property in trust for the receiver, and in the prayer the receiver offers to pay to the

appellants the amount that was paid to the State of Washington to perfect their title, and the taxes for the sixteen years thereon, and for general relief. (Tr. pp. 2-15.)

Separate answers were made by the three appellants, and, briefly, they admit the allegations of the bill with reference to the time each of the three parties acted as receiver. They admit the sale to Sol G. Simpson on November 26, 1897, and admit that the same was made after an order of the United States Court had been obtained therefor, but allege that the sale was made with the full knowledge and consent of the Comptroller and his examiners, and that after the sale to Simpson, which was made at a profit to the receivership estate, report thereof was made to the Comptroller of the Currency, and the money remitted therefor.

The answers further allege that in March, 1899, the appellant Baker repurchased from Simpson one of the two blocks that had been sold to Simpson by paying him therefor the amount that had been expended thereon, together with interest and costs.

The answers further allege that the receiver did not have the right as a matter of law to purchase the tide land contracts from the State, for the reason

that the same was not within the contemplation of the statute.

The answers also further allege that the appellee has been guilty of laches. That he cannot do equity. That the appellants have paid the taxes upon the property for more than seven successive years before the commencement of this action, and deny that the appellee is the owner of the land or has any interest therein, and also deny all the allegations of the bill with reference to fraud or of secret dealing. (Tr. pp. 21, 32, 52.)

After the trial the lower court entered its decree adjudging that the sale to Simpson of block 430 through an assignment of the tide land contract was fraudulent, and was made for the use and benefit of the appellant Baker. That in the repurchase which Baker made from Simpson, whether the same was oral or in writing, the same were fraudulent and void. That the conveyances by the State of Washington to appellant Norton, and from Norton to the Seattle Water Front Realty Company, were likewise void as against the said appellee. Also that the harbor area lease No. 181 was likewise an asset of the receivership, and the officers and agents of the Seattle Water Front Realty Company are directed to execute a deed to the receiver covering block 430

and the harbor area lease No. 181. The decree further directs that:

“Neither the defendant Seattle Water Front Realty Company nor defendants Baker and Norton shall be required to make, execute or deliver any of the aforesaid instruments until there shall have elapsed thirty days after the time in which appeal can be taken by defendant Seattle Water Front Realty Company, nor, in the event of appeal being taken by defendant Seattle Water Front Realty Company, until thirty days shall have elapsed after such appeal, if any, shall have been finally determined adversely to it and if, no appeal being taken by defendant Seattle Water Front Realty Company, or such appeal being adversely determined to it, the defendant Seattle Water Front Realty Company shall make such deposit of instruments as aforesaid, then within sixty days from such delivery of conveyances to the clerk of this Court, the complainant shall pay or cause to be paid into this Court for the defendant Realty Company, the sum of \$10,977.13, to-wit, \$8,130.19 principal and \$2,846.94 interest, said principal being all the sums by the defendants expended in taxes upon the aforesaid Block 430 and Harbor Lease 181 and in payments directly or indirectly made to the State of Washington under the contract for Block 430 aforesaid and upon said lease, and should complainant fail so to do, he shall lose the benefits of this decree. The defendant company may immediately withdraw the aforesaid sum without further order of the Court.” (Tr. pp. 81, 82.)

It is from this decree that this appeal is taken.

ASSIGNMENTS OF ERROR.

I.

Because the appellee has no right or authority under the laws of the United States to maintain the action set forth in his second amended bill of complaint on which said cause was tried.

II.

Because the appellee has no authority and has at no time had any authority from the officers of the Government of the United States having jurisdiction of receiverships of national banks, to comply with the conditions of the decree which was rendered, or of any decree which under the issues might have been rendered, in that said officers had not prior to the commencement of said suit, nor have they since the commencement of said suit, authorized the payment to appellants or either of them, of the money adjudged to be due under the findings of the Court and the money to which said appellants would be entitled under any decree which might or could have been rendered.

III.

Because there is not and has not been for more than ten years last past available to the trust which

the receiver represents in this action any funds with which to do equity to the appellants and each of them.

IV.

Because the District Court erred in finding and adjudging that the appellant Baker had no authority to sell Tide Land Contract No. 728 covering the purchase from the State of Washington of Tide Land Block 430 to Sol G. Simpson.

V.

Because the District Court erred in finding and adjudging that the appellant Baker, while acting as receiver of the Merchants' National Bank, did not make a *bona fide* sale of Tide Land Contract No. 728 covering Tide Land Block 430 to Sol G. Simpson, and in finding that the said Baker at the time of making said sale reserved to himself, for his own benefit and use, the said contract and an interest therein.

VI.

Because the District Court erred in finding and adjudging that the appellant Baker did not acquire an assignment of said Tide Land Contract No. 728 covering Tide Land Block 430 from Sol G. Simpson

in good faith and in the usual course of business, and in finding that a trust attached in favor of the Merchants' National Bank, its stockholders and creditors, to the title acquired by the said Baker from the said Simpson.

VII.

Because the District Court erred in finding and adjudging that the title acquired by the appellant Baker from the State of Washington to the said Tide Land Block 430 was in trust for the use and benefit of the insolvent Merchants' National Bank, its creditors and stockholders, and in holding that the title acquired by the appellant Water Front Realty Company was and is subject to said trust.

VIII.

Because the District Court erred in finding and adjudging that the appellee's action was not, prior to its commencement, barred by lapse of time and laches.

IX.

Because the District Court erred in finding and adjudging that appellee's action was not, prior to its commencement, barred by the statute of limitations of the State of Washington.

X.

Because the District Court erred in including in the decree the harbor area lease adjacent to and in front of said Tide Land Block 430 purchased by Sol G. Simpson from the State of Washington after the appellant Baker had ceased to be receiver.

XI.

Because the District Court erred in ordering the appellant Seattle Water Front Realty Company to hold said harbor area lease for the use and benefit of the appellee and to convey legal title to the appellee.

XII.

Because the District Court erred in finding that the said harbor area lease was at any time a part of the trust of the Merchants' National Bank.

XIII.

Because the District Court erred in finding and adjudging that the stock of the appellant A. S. Norton in the appellant Seattle Water Front Realty Company, which was issued to said Norton in consideration of an undivided 3% interest, purchased by said Norton from said Baker prior to the conveyance to said appellant Seattle Water Front

Realty Company, was not a *bona fide* purchase by said Norton, and the Court erred in holding that said 3% interest was subject to said trust of the Merchants' National Bank and its receiver.

XIV.

Because the District Court erred in finding and adjudging that the interest in the appellant Seattle Water Front Realty Company owned by A. S. Norton in the form of stock purchased by him after the formation of said company, and the interest in said company owned by the Union Savings Bank & Trust Company of Seattle in the form of stock assigned to said company, is subject to the trust decreed by the Court in favor of the appellee.

XV.

Because the District Court erred on the trial in admitting, over the objections of the appellants, that portion of the testimony of the witness Francis Rotch wherein it appears that the said Rotch, in answer to a question to state a conversation with Sol G. Simpson in 1900, testified:

“Mr. Simpson was turning a great many things over to me and of course I opened a great deal of his mail, unless it was marked Personal, and I came across a notice from the Land Commissioner saying

that there was a payment due and interest due on Block 430 and so I went to Mr. Simpson and asked him whether I should pay it or not * * *. That was in the year 1900—the end of 1900. I have refreshed my memory about that. He said, ‘Yes.’ He said ‘Pay that.’ He says, ‘That belongs to Charlie Baker,’ and then I said, ‘Shall I pay it?’ and he says, ‘Yes, pay it.’ And then I paid it and made the entry of it in my books and charged Mr. Baker with that payment, but that was all the conversation we had at that time as I remember it.” (Tr. p. 89.)

And after a further question, as follows:

“It came up again about two years later—I think 1902; I am not quite certain about that, and Mr. Simpson was hard up in those times. He had a good deal of property but did not have much money and we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said: ‘Now, can’t we get rid of this Block 430?’ I thought maybe at that time probably he got it from Baker or something of the kind. He said, ‘No, Mr. Baker put that in my hands and I have to hold it in trust for him right along.’ He said, ‘We cannot dispose of that.’ ” (Tr. p. 90.)

And further, in answer to a question by appellee’s counsel:

“Q. Just the same, he told you in substance that he was carrying that property for Charlie Baker, or words to that effect?

“A. Yes, sir.

“Q. And that he never had any interest in it?

“A. Yes.” (Tr. p. 90.)

To all of which testimony, and the questions eliciting the same, objection was made at the time on the ground that the evidence was hearsay, immaterial and irrelevant.

XVI.

Because the District Court erred in admitting on the trial the evidence of the witness Lester Turner over the objection of the appellants, that in 1898 or 1899 he, the witness, had a conversation with Sol G. Simpson as follows:

“The conversation came up in this way: I was talking to Mr. Simpson in regard to tide land holdings that the bank held. It owned quite a large amount of tide lands and he was director of the bank, and I talked to him about the plans of the bank and in that connection I asked him about his own holdings down there. I knew that he held some tide lands. And he told me that a portion of those lands belonged to Charlie Baker—that he was carrying the title for him to accommodate him.”

And also the following in response to a question as to a later conversation:

“I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way incidentally to the properties and I asked him how he came to hold the title to that property that belonged to Baker. ‘Well,’ he said, ‘Baker did not want it known that he had taken the property while he was

receiver of the bank and it might not bear investigation,' and he was carrying it for that reason." (Tr. p. 91.)

Which testimony was objected to by appellants' counsel as hearsay, immaterial and irrelevant.

XVII.

Because the District Court erred in rendering a decree in favor of the appellee, which decree is contrary to the testimony and against the law because the equity of the case entitled the appellants to a decree of dismissal.

STATEMENT OF FACTS AS DISCLOSED BY THE EVIDENCE.

The appellant Charles H. Baker became a resident of the State of Washington in 1887, immediately following his graduation from Cornell University. For six years after he arrived in Seattle he practiced the profession of civil engineer, and during that time became connected with the building of an electric light and power station for the Rainier Power & Railway Company. (Tr. p. 254.) That owing to the panic of 1893 he became financially embarrassed, and sought the postmastership of Seattle, receiving the endorsement of many prominent people. Failing in the application for postmaster, he received in

June, 1895, the appointment as receiver of the Merchants' National Bank. (Tr. p. 256.) This position he held until April, 1899, when he resigned and A. W. Frater was appointed in his stead. (Tr. p. 167.) Judge Frater wound up the affairs of the trust, making a final report and distributing all the assets of the trust, and the same was closed by July, 1901. (Tr. p. 168.) He did not resign, nor was anything done in the receivership until February, 1913, when he received word from the Comptroller of the Currency asking him to resign, and thereupon the present appellee, John W. Schofield, a national bank examiner and connected with the office of the Comptroller of the Currency, was appointed receiver. (Tr. p. 189.) At the time appellant Baker was appointed receiver, he employed as his attorneys the firm of Stratton, Lewis & Gilman, which firm continued to act as attorneys for receiver Frater to the close of the receivership. Baker also employed as bookkeeper Harry Meserve, who continued in that position until March or April, 1897, and was then succeeded by Joseph B. Hill who acted as bookkeeper for Baker until he went out of office in April, 1899. (Tr. p. 216.)

In February, 1897, Baker wrote to the Comptroller of the Currency setting forth that by virtue

of the bank being the owner of certain upland property bordering upon Seattle harbor it was entitled thereby to a prior right of purchase from the State of certain contiguous tide lands; setting forth that the law gave the right to contract for such purchase in ten annual payments, and that the contracts were assignable; stating also that in his judgment this right to purchase was a valuable asset of the trust, and directed the Comptroller to ratify his having taken up these contracts with the State, and stating the appraised value of the various pieces of property therein set forth. It should be here remarked that the bank had filed these applications for the preference right to purchase prior to the appointment of the receiver, but the applications had not yet been allowed. The Acting Comptroller replied to this letter approving the securing of these contracts, and stating "inasmuch as the contracts are assignable, they can no doubt be disposed of to advantage at any time, should such a course seem advisable." (Tr. p. 99.)

The receiver made the first payment January 12, 1897, when Harry Meserve was bookkeeper. On contract No. 727, being block 429, he paid \$66.40; on contract No. 728, being block 430, he paid \$148.80. The next payment was made March

1, 1897. The reason for this payment being made so close to the first was because the law provided that payments should be made on March 1st. This second payment on each of these contracts was for the same principal amount. On contract No. 727 covering block 429, he paid \$4.78 interest, and on contract No. 728 covering block 430, he paid \$10.42. These were all the payments the receiver ever made upon these contracts. (Tr. p. 115.)

These disbursements were entered in the ledger, and the amount of money which was paid out was entered as "Additional Assets Good." (Tr. pp. 192, 193.) The contract which was issued to the receiver provided for the payment of one-tenth of the appraised valuation of block 430 (which was \$1,488.) on the 1st day of March of each year, together with the interest upon the remaining portion of the principal for the next ten succeeding years. (Tr. pp. 104-108.) This contract was—

"Subject, however, to any lien or liens that may arise or be created in consequence of or pursuant to the provisions of an act of the Legislature of the State of Washington entitled 'An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state,' approved March 9, 1893." (Tr. p. 105.)

Under this law these tide lands were filled—this work of filling having been completed in the summer of 1913—and the filling charges against block 430 aggregate \$79,352.76 (Tr. p. 211), for which certificates have already been issued, all of which remain unpaid.

In the early part of 1897, after receiver Baker had sold off all the assets that could be turned, he issued under the direction of the Comptroller of the Currency a circular, scheduling therein all the remaining assets of the trust, and the same was printed in pamphlet form, addressed to the creditors, and upon the outer sheet thereof was the following:

“To the Creditors of the Merchants’ National Bank:

In view of the great difficulty and necessary sacrifice in converting to cash the real estate and other assets of this trust, I have been authorized by the Comptroller to effect exchanges of such assets for outstanding Receiver’s certificates with such holders as may be desirous of doing so upon a satisfactory basis.

Chas. H. Baker,
Receiver, Seattle, Wash.” (Tr. p. 217.)

The schedule of real estate and other assets included all the tide land contracts that were held by the bank, among which were tide land contract No. 727 on block 429 and tide land contract No. 728 on block 430. (Tr. pp. 218-227.) Joseph B. Hill,

the bookkeeper, says that this circular was sent out to all the creditors of the bank. (Tr. p. 228.) Mr. Baker says that these circulars were mailed to the stockholders, creditors and principal real estate men around Seattle, and other people who were in the habit of making investments. (Tr. p. 258.) Mr. Hill says there were no customers for these, nor were there any inquiries made excepting the application of A. H. Anderson and W. D. Hofius & Company, and that these two applications were the only ones they ever had to buy any tide lands whatsoever. (Tr. p. 236.) Mr. Baker says that prior to November, 1897, he does not recall an application in response to this circular, or otherwise, from any creditor of the bank to exchange his claim against the bank for any of these listed Seattle tide lands, and there were no applications to purchase any of these tide lands, and in fact he says there was no application to purchase any of the other assets of the estate. That the real estate market was absolutely dead; in fact there was no market, and that this condition continued up to the time when he turned over the receivership to his successor. (Tr. p. 259.)

After having made these strenuous efforts to dispose of these "chips and whetstones" remaining

in the receivership, a special examiner appeared upon the scene—which was the custom about every six months. This examiner, Wm. L. Seeley, came to Seattle in the fall of 1897, after a six months unsuccessful campaign had been made by means of this circular with all the creditors, stockholders and other parties that might be interested to exchange these remaining assets for outstanding receiver's certificates. It should be borne in mind that these receiver's certificates were simply the evidence of claims that had been presented against the receiver and properly allowed—all in accordance with the custom of the Comptroller of the Currency. Under date of October 9, 1897, Examiner Seeley made a report to the Comptroller of the Currency, writing a letter inclosing therein his report, and also certified copies of a petition and order authorizing the compromise and private sale of the assets of the trust, all of which were by the examiner considered bad and doubtful. (Plaintiffs' Ex. 8; Tr. pp. 120, 121.) The analysis of this report of the examiner is of controlling importance. It will be remembered that he had come here for the purpose of looking into the affairs of the bank, and after examining the same gives his views of the method by which this estate must be wound up. After reciting that

there does not appear to be any material change in the affairs of the trust, the examiner goes on to report as follows:

“The receiver is proceeding under the authority given him by you to exchange real estate holdings of the trust for receiver’s certificates. The disposition of the real estate in this manner is to the interest of the creditors of the trust. * * * While it is true that there is a material improvement in Seattle, and inside business and dwelling property has appreciated, the effect has not been felt in outside additions, and it is not probable that the holdings of the trust will appreciate to any considerable extent during the life of the receivership. In any event the valuation placed upon the real estate by the receiver in making the exchange for receiver’s certificates at their face is sufficient to meet any natural advance and make the exchange favorable and to the interests of all concerned.

“I do not find any material appreciation of the assets or change in conditions which justifies reporting thereon in detail, these matters being heretofore fully reported by me. *The remaining assets are practically bad and doubtful*, from which in my judgment more can be obtained by compromise and private sale than through an attempt to enforce collection, or their disposal at public auction. It is the judgment of the receiver and his attorneys, and it appears to be to the interest of the creditors of the trust, that the receiver have full power and authority to so compromise and sell privately *the remaining assets*, and I have, in connection with the attorneys of the receiver petitioned the United States Circuit Court, and obtained an order thereof, authorizing him as such receiver to compromise and sell privately *the bad and doubtful assets remaining in his hands, for cash.*” (Tr. pp. 122, 123.)

This petition and order secured by Examiner Seeley "in connection with the attorneys for the receiver" is the petition and order which it is alleged in the bill were couched in vague and uncertain terms with the purpose on the part of the receiver to aid him in carrying out his conspiracy to defraud the estate.

Some question has been raised throughout the trial that, inasmuch as the technical listing of these tide land contracts, to the extent to which cash had been invested therein, was under the heading of "Additional assets good," Examiner Seeley did not intend to include these among his general statements in his report "the remaining assets are practically bad and doubtful". A letter from the Comptroller of the Currency, Charles G. Dawes, under date of April 7, 1898, addressed to Mr. Baker, referring to the report of Examiner Seeley, recites that Seeley "states that it is the judgment of the Receiver and his attorneys, *that you as Receiver have full power and authority to compromise and sell the remaining assets of your trust, then remaining in your hands*". (Tr. p. 129.) We cite this interpretation which the Comptroller himself places upon Examiner Seeley's report after it had been on file in the Comptroller's office for some six months.

We now arrive at that point in the statement of these facts where receiver Baker acted with reference to the authority given him by the order of the court that was secured upon the petition of Examiner Seeley in connection with the attorneys for the receiver. It will be borne in mind that even up to this time none of the creditors holding receiver's certificates considered these tide land contracts, with 90% of the appraised valuation yet to be paid and drawing 6% interest, and subject to the filling lien which might be imposed upon them at any time, of sufficient value to exchange their evidences of indebtedness against a defunct bank for this tangible property.

This block was then located out in deep water, about one-half a mile off the shore at West Seattle, and about a mile down the bay from its head. (Tr. p. 117.) The only direct evidence that we have upon the sale of these blocks to Sol G. Simpson is that of appellant Baker himself. Mr. Simpson's voice was silenced by death about eight years ago. A. H. Anderson, who had a direct connection with this transaction and through whom the sale was made, was still alive at the time of the trial of this case, but, owing to his then suffering from an incurable disease from which he died a few days after the

trial, was unable to give testimony in the case, as was shown by the testimony of his attending physician. (Tr. p. 243.)

It will be remembered that Examiner Seeley was in Seattle in the early part of October, 1897. The petition for the sale of the remaining assets of the trust was presented, and an order secured on October 9th. All of the liquid assets had been disposed of. There was no real estate market; everything was absolutely dead. The circular sent to all the stockholders, creditors and real estate men of Seattle, some seven or eight months previously, had produced no result. Baker gives very graphically the situation.

“When the examiner was here he said that the practice of the Department, when the assets got slow and stagnant, was to close them up as expeditiously as they could by private sale, and to that end they authorized the receivers, under a blanket order, to make the best sales and disposition that they could. Mr. Seeley was the examiner here at that time and he, therefore, had a petition prepared to the Court to authorize such a general order, and a general order from the Comptroller was obtained.

MR. BAUSMAN: A general order what?

A. (Continuing.) From the comptroller. Then in the latter part of November, 1897, I took these contracts to Mr. Simpson and Mr. Anderson and tried to get them to buy them. I wanted them to buy all the bank's holdings, and Mr. Anderson was not

interested and did not see anything in them. Mr. Simpson did not, but he asked me to make a price on them, and the price I made was the cost of it plus fifty dollars on each contract, and Mr. Simpson said he would take two of them. So that disposed of the first two of the bank's holdings in tide lands, and that was the first offer, with the exception of a dollar apiece that had been obtained, since we had them.

Q. You say you had had an offer of a dollar apiece, when was that offer made?

A. Well, that was made about the middle of 1897, I should say.

Q. Was that offer of a dollar apiece for the assignment of the contract as it then stood, or a dollar apiece profit to the trust?

A. A dollar apiece for the contract as it stood.

Q. You had made at that time payments to the State?

A. Yes.

Q. And Mr. Simpson was to pay you, in addition to what you had paid to the State, fifty dollars for each contract, was that correct?

A. Yes.

Q. That was your arrangement with him?

A. Yes.

Q. Did Mr. Simpson give you any money or other equivalent of money with which to consummate this transaction?

A. I think he gave his check for it.

Q. In determining how much you had in these contracts, from whom did you get the information,

that is how much the trust had in them, from whom did you get the information?

A. From Mr. Hill, who was the clerk.

Q. He was your clerk and bookkeeper, wasn't he?

A. Yes.

Q. And to the result given you by Mr. Hill, then you added fifty dollars, is that what I understood you to say was done?

A. Added fifty dollars to the figures given me by Mr. Hill.

Q. If there was an error in that computation, it resulted in that way, did it?

A. Yes.

Q. At that time, Mr. Baker, and for a considerable time after that did you have any reserve interest, in expectancy or actual, present or in expectancy, in those two contracts?

A. I did not.

Q. Did you at that time have any expectation of ever acquiring any interest in those two contracts?

A. I did not." (Tr. pp. 260, 261, 262.)

Mr. Baker says that Mr. Anderson and Mr. Simpson were business associates. (Tr. p. 263.) That Mr. Simpson, who was regarded as a very wealthy lumberman, did a great deal of speculating, and "he was always taking flyers." (Tr. p. 262.) Mr. Baker says he secured the amount that had been expended upon these two blocks from Mr. Hill, his

bookkeeper, and then added fifty dollars to each one of the contracts, and this was the sum at which he assigned these contracts to Simpson. There appears, however, to have been an error in this. Instead of but one payment having been made on these contracts, there had been two—one of them having been made in January, 1897, while Harry Meserve was bookkeeper for the receiver, and the other in March of the same year after J. B. Hill became bookkeeper. (Tr. pp. 114, 115.) When Hill gave Mr. Baker the amount that was due, he overlooked the payment that had been made to the State when Meserve was bookkeeper, so that Baker added the \$50.00 to the one payment that had been made on each of the contracts plus the interest, and this is the sum which formed the basis of the sale to Simpson. This sale was made on November 26, 1897, and the sale was reported to the Comptroller of the Currency in the next quarterly report in the usual and ordinary way, and upon the form sent out by the Comptroller. (Tr. p. 263; Defts. Ex. E. Tr. p. 200.) It will be observed that the report to the Comptroller shows the following—that the receiver “Sold to S. G. Simpson Tide Land Contracts # 727 & 728..... 315.20.” (Tr. p. 200.) This was the report that was made to the Comptroller of the Currency. In

addition to the report made to the Comptroller of the Currency there was entered upon the journal and in the ledger of the receiver the following:

“Additional Assets (good)—
Tide land Contracts # 727, 116.40 # 728, 198.80
sold to S. G. Simpson.....315.20.” (Tr. p. 194.)

In each of these items it will be observed that there is \$50.00 additional to the one annual installment paid the State. Mr. Baker says that the examiner knew all about this sale. (Tr. p. 265.) That the contracts No. 727 and No. 728 were listed among the assets of the receivership, and that when the sale was made to Simpson these contracts were delivered to Simpson and the money entered in their stead. (Tr. pp. 264, 265.) Mr. Baker also stated that it would be impossible to misplace or lose these contracts, so that the examiner each time would be thoroughly cognizant of the fact that these contracts were no longer among the assets of the receivership, and that certain moneys had been substituted therefor. (Tr. p. 275.)

In the early part of 1898, during the time that Mr. Baker was still receiver and shortly after this sale to Simpson, Mr. Baker took over what is known as the Snoqualmie Falls Power Company. The trustees of this company, among others, were himself,

Mr. Simpson and Mr. Anderson. The development of this electric enterprise brought the severest opposition from the General Electric Company, a competitive company, which resulted in their stirring up all the trouble they could for Mr. Baker in his receivership, (Tr. p. 266) and, as a result, charges were made against his administration of the trust. (Tr. p. 267.)

“Q. Do you know whether or not charges were made against your administration of this trust, along about the year 1898, and from then on?

A. Yes, there were a good many charges—there were several charges.

Q. Do you know whether a special examiner came here to investigate those matters?

A. Mr. Wing was a special examiner and he came for that purpose.

Q. At the instance of whom, as you were informed?

A. The comptroller.

Q. Now, you may state to the Court what examination Mr. Wing made of the affairs of your trust.

A. He made the usual examination that every examiner makes as to the condition of the assets, of the assets which had been liquidated and so forth, and then he stated that he had been charged to investigate a number of complaints that had been filed, and particularly complaints with reference to Anderson and Simpson. Just what the complaints

were he did not disclose except that they were complaints.

Q. Did he examine your books in that connection?

A. He did, yes.

Q. Did he make an unusually close examination of the properties that were remaining?

A. He did.

Q. Now, do you know whether or not he was informed at that time of the sale of those two blocks No. 429 and 430 to Sol G. Simpson?

A. Yes, he was informed.

Q. And he was informed of the price at which you had sold them?

A. He was.

Q. Was that a part of the investigation which he was making?

A. That was a part of the investigation.

Q. Mr. Hill testified here yesterday that he accompanied Mr. Wing over to West Seattle to see the tide lands; do you know whether he examined the balance of those tide lands in connection with the matter?

A. He went for that purpose and I suppose he did.

Q. In other words, that was the purpose you know that he went for?

A. Yes.

Q. Did you discuss with Mr. Wing the value of those tide lands at that time, and the market conditions surrounding them?

A. I did." (Tr. pp. 267-268.)

Mr. Hill, the bookkeeper, refers likewise to Mr. Wing, the examiner sent here, and says that he was here two or three days, and that in connection with Mr. Wing's examination of the assets of the receivership he showed him these tide land properties in West Seattle. (Tr. p. 230.) While Mr. Wing was in Seattle he interviewed Mr. Simpson and Mr. Anderson, and a great many other people around town, including those who had made complaints; also bankers and business men generally. (Tr. p. 269.)

At this juncture in the statement of these facts, we pause to make two comments:

First. That from the time Mr. Wing made this personal investigation as to the value of these tide land properties, and this transaction with Mr. Simpson, until this suit was brought, not one criticism was ever raised against Mr. Baker for this transaction.

Second. Mr. Wing, a special examiner of the Comptroller of the Currency, at the time of the trial ought to have been accounted for in some way, or produced at the trial as one who would be able to speak definitely upon this matter, and if not then the report he made to the Comptroller of the Currency should have been produced.

The efforts of the appellants to take the deposition of the appellee and the Acting Comptroller of the Currency at the time the suit was brought, in order to inquire into some of the records and proceedings of the Comptroller's office, and get the letters and reports bearing upon this matter, was promptly met with urgent objections by counsel for the appellee, and the Court denied the appellants this right. (Tr. p. 73.)

The sale to Simpson of these two contracts was on November 26, 1897. The investigation by Special Examiner Wing was in the spring of 1898. No further offer was made for the remaining West Seattle tidelands, until March, 1899. It appears from a letter written by receiver Baker to Comptroller Dawes, dated March 27, 1899, that he had sold, subject to the approval of the Comptroller, lots in block 431 for \$1,000. Mr. Baker remarked in this letter—"This is therefore an additional asset and when your Mr. Wing was here no value was set upon it." (Tr. p. 201.) This is further evidence that Mr. Wing went through and valued all of these tide lands. That these transactions took place in March, 1899, there can be no doubt from all the record. (Tr. pp. 201, 270.) It was in March, 1899, that Baker received an offer from Anderson for the

remaining West Seattle tide lands. (Tr. p. 269.) While Anderson was negotiating for these West Seattle tide lands, Mr. Baker had a conference with Mr. Simpson, (Tr. p. 270) and at which time Mr. Simpson said he was thinking of selling the two contracts he had purchased from Baker about a year and a half previously. (Tr. p. 271.) Anderson's negotiations with Baker were for all the remaining five tide land contracts that the bank held, and it appears that he figured also on buying these two contracts from Simpson. (Tr. p. 271.) It was at this time that Baker asked Simpson if he would not sell him one of the contracts for what he had in it, and this Simpson agreed to do. (Tr. p. 271.) The other contract on block No. 429, was sold by Simpson to Anderson, and turned over by Anderson to W. D. Hofius & Company, the same party who purchased through Anderson the remaining West Seattle tide land contracts held by the receiver. Baker says with reference to this transaction with Simpson:

“Well, I told him I would like to have him carry the title for me. I gave him a note for his advances and interest and I asked him to carry the title of it until I would get rid of my judgments. I was consolidating the street railways in Seattle and promoting this power company deal and had a

large expectancy through the success of those projects, and he agreed to do it. That was the arrangement.” (Tr. p. 271.)

At this time Simpson was a trustee of the power company, was interested with Baker, and his prospective interests in the company were promising. (Tr. p. 272.) It will be kept in mind that Baker was heavily encumbered with judgments that were standing against him, and which were not liquidated until 1905, and, as Baker testified, it was for this reason that he wanted Simpson to keep the title in his name until these judgments were cleared up. (Tr. p. 271.)

The sale of the remaining five tide land contracts were made to Anderson for \$2,000 cash. (Tr. p. 203.) This was entered upon the journal and ledger of the receiver in due and orderly course. (Tr. p. 196.) It appears from the evidence in this case that Anderson, who bought the rights of the receiver in block 431 for \$1,000, sold this to W. D. Hofius & Company for \$1,750, and the five remaining blocks of tide lands, the contracts on which he bought from the receiver, for \$2,000, and the contract on block No. 429 that he bought from Simpson, he sold to W. D. Hofius & Company for \$5,000. The receiver reported this sale to the Comptroller

of the Currency in his quarterly report as usual. (Defts. Ex. I; Tr. pp. 207, 208.) Baker never knew what profit, if any, Anderson made until about a year ago when Baker was in Seattle, (Tr. p. 322) and did not know when he was a witness upon the stand in this case that Anderson had procured block 429 from Simpson and included this in his sale to W. D. Hofius & Company for \$5,000. (Tr. p. 322.)

Mr. Baker says that he was actively engaged in the power business in the spring of 1899, when he resigned from the receivership, down to the time when his father died, which was October 6, 1903. (Tr. p. 276.) That in the spring of 1904, he was expecting a partial distribution from his father's estate, and it was then that he took up with Mr. Simpson the matter of transferring the legal title to him. (Tr. pp. 276, 277.) At this time Mr. Baker cleaned up the various judgments that had been recovered against him. He says that Mr. Mark E. Reed substantially stated all the facts with reference to the matter of his taking over this title, (Tr. p. 277) and we therefore turn to Mr. Reed's testimony, who was a witness for the plaintiff, to ascertain these facts, which bind the appellee and which the appellants accept.

Mr. Reed was a son-in-law of Mr. Simpson; he is native born of the State of Washington, a logger by business, and a member of the Capitol Commission of the State. His first business connection with this Baker matter was in the early part of 1904. (Tr. p. 146.) It was about this time that Sol G. Simpson turned over to Mr. Reed, his son-in-law, the business management of his properties, and Mr. Reed upon taking charge of these properties found that Mr. Simpson had listed block 430 among his assets. (Tr. p. 155.) In discussing property matters, Mr. Simpson told him that block 430 belonged to Charles Baker. (Tr. p. 155.) In May, 1904, while Mr. Baker was in California, he called on Mr. Simpson, who was there for his health, and discussed with him this property matter. Upon being referred to Mr. Reed, communication was then had with Mr. Reed by letter reading as follows:

“May 9th, '04.

Mr. Mark Reed,

Seattle.

Dear Sir:

I had a talk with Mr. Simpson in S. F. about the tide land which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first 2 or 3 payments I

made myself. Mr. Simpson's books, however, will show the status of the account. There is one more payment due next March to complete the contract with the state. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson and send same to Chicago, and I will send you from there a form of assignment to execute, together with note for the account, due 1 year after date, which plan Mr. S. consented to and will doubtless advise you to that effect.

I may be away several months and I may have occasion to use the item, or dispose of it, and so I think it had better be put in the shape indicated.

My address will be as below.

Yours very truly,

CHAS. H. BAKER,

Auditorium Annex, Chicago.

I believe there is an item to my credit also of a certain sum for right-of-way across the tract sold to the N. P." (Tr. p. 147-8.)

The first two or three payments made by Mr. Baker and referred to in this letter, were the payments made by Baker to Simpson when he purchased the property from Simpson in March, 1899. These are referred to by Mr. Baker. (Tr. pp. 282, 283.)

Mr. Baker wrote another letter to Mr. Reed in November, 1904 (Tr. p. 148), and again in January,

1905. (Tr. p. 150). Mr. Reed then secured from the Commissioner of Public Lands, at Olympia, the balance due on contract No. 728. This was furnished by the Commissioner of Public Lands and formed the basis of the settlement between Mr. Baker and Mr. Reed. (Tr. p. 151.) The amount remaining due the state on this contract was \$1,077.28. (Tr. p. 152.) When the settlement was made Mr. Baker gave Mr. Reed two checks—one for \$1,077.28, and the other for \$2,000. The check for the amount due the state was taken by Mr. Reed and indorsed over to E. W. Ross, Land Commissioner for the State, and forwarded to the office of the Land Commissioner. The other for \$2,000 was retained by Mr. Reed. Mr. Reed stated: “There was a lease of the waterway in front of the lots that Mr. Simpson had acquired in his own name, and I insisted that Mr. Baker should take that lease along with the block and pay for the lease. I remember we had some dealings backwards and forwards in arriving at a settlement as to the price of the lease.” (Tr. p. 153.) Mr. Baker then paid Mr. Reed the amount of the advances with interest at 6% per annum, and, in addition thereto, paid the amount that was agreed upon as the purchase price of harbor area lease No. 181. (Tr. p. 154.) Mr. Reed stated that the main point

of their discussion was to arrive at a sum that should constitute the consideration for the transfer of this lease. (Tr. p. 162.)

“Q. The point is that you agreed upon a lump sum for the sale of the harbor area to Baker or his assigns?

A. Yes, sir.

Q. That had nothing to do with any advances Mr. Simpson had made on that account?

A. No, sir.

Q. Your contention now was, Mr. Reed, or rather your idea was that Mr. Simpson owned that harbor area and you wanted to sell it in connection with the transfer of the land?

A. I think so, that was what I told Mr. Baker, that he owned the harbor area and I did not propose to transfer the block back to him unless he took the area because it was no use to us.” (Tr. p. 163.)

These sums were then agreed upon and Mr. Reed forwarded to the Commissioner of Public Lands this check accompanied by a letter. (Tr. p. 156.) This check was drawn upon the Washington National Bank of Seattle, where Mr. Baker kept an account. It appears that he had expected certain moneys to be deposited to his credit, but they were not so deposited in time to take care of the check when it was presented for payment in due course.

(Tr. p. 164.) As soon as the check was protested Mr. Reed addressed another letter to the Commissioner of Public Lands referring to the check given by *Mr. Charles H. Baker* to pay for balance due on tide land contract No. 728 for block 430, stating that the check had been protested, and directing the Commissioner of Public Lands to hold all papers in the case until Mr. Reed should take the matter up again with *Mr. Baker*, which he would do at once. (Tr. p. 157.) The correspondence connected with tide land contracts was all kept with the duplicate copies of those contracts on file with the Commissioner of Public Lands. (Tr. p. 254.) The foregoing communications become important as being one of the sources disclosing upon the face of these transactions the direct connection of Mr. Baker with this property as early as 1905, and these facts disclosed by the public records could have been discovered by a mere examination of the files. (Tr. pp. 157, 158.) This check was protested and notice thereof given to Mr. Reed; also Mr. Baker; also the Commissioner of Public Lands; likewise the Capitol National Bank of Olympia; as well also the Washington National Bank of Seattle. (Tr. p. 161.)

During the course of straightening out this title considerable correspondence was had with the

Commissioner of Public Lands by Norwood W. Brockett, Mr. Baker's attorney, on the letterhead of the Seattle-Tacoma Power Company, which designated Thomas B. Hardin as general attorney and Norwood W. Brockett, assistant attorney. (Tr. pp. 247-254.) These letters were all filed with tide land contract No. 728, covering block 430. (Tr. p. 254.) Mr. Hardin and Mr. Brockett had no other legal connection than this power company, which was known as Mr. Baker's company. (Tr. p. 273.) Mr. Hardin had given up his private practice to join Mr. Baker in this enterprise. (Tr. pp. 274-279.) In addition to this correspondence, as early as 1904 Mr. Baker wrote to the Commissioner of Public Lands with reference to the harbor area in front of block 430, and received a reply from the Commissioner stating that the harbor area in front of block 430 was under lease to S. G. Simpson. (Tr. pp. 278, 279.)

It appears that after Mr. Baker had cleared up the judgments that had been recovered against him that no unusual secrecy was maintained with reference to the ownership of this property, considering Mr. Baker's method of handling all his business affairs. As Mr. Norton, his attorney and subsequently the attorney for Receiver Frater, says:

"I might say this: That in all my transactions

with Mr. Baker, in his different matters, water power enterprises and other enterprises, that he seemed to be a rather exceptionally reticent man and I would not know about his business myself until there would be some occasion for me to take a hand in it to do something about it, and then I would find out that for a long time, perhaps, he had had an interest in something or been negotiating with something.” (Tr. p. 184.)

In 1906, when the railroad excitement came on, which was the first real impetus that tide land properties had, Mr. Baker received a letter from McGraw & Kittinger asking for a quotation upon this property. (Tr. p. 281.) In 1907, when Mr. Baker got a loan from the National Bank of Suffern, New York, that bank wrote to the Seattle National Bank of Seattle with reference to the value of the stock in the Seattle Water Front Realty Company, which owned block 430. (Tr. pp. 280, 281.) Mr. A. S. Norton, in whose name the title to this property was taken when the purchase was completed from Simpson, had been Mr. Baker’s attorney during the receivership; had continued as the attorney for Judge Frater after he became receiver. (Tr. p. 168.) After Examiner Wing’s visit none of this was further investigated, notwithstanding the fact that Mr. Baker’s enemies circulated vicious reports about him and about this transaction being a questionable one,

and the matter was taken up with Judge Frater's attorneys, Messrs. Preston & Gilman. (Tr. p. 171.) On September 9, 1907, Judge Frater, who was still the receiver of the Merchants' National Bank of Seattle, as presiding Judge of the Superior Court of King County, granted Mr. Baker's wife a divorce, and, as a part of the property settlement in that divorce proceeding, certain of the capital stock of the Seattle Water Front Realty Company was awarded to the wife, and the court found that the settlement appeared to him to be just and equitable. (Tr. p. 212.)

We now turn to the evidence as it relates to the actual value of this property at the time Baker sold it to Simpson on November 26, 1897. C. B. Bussell, who admitted that he was the original tide land boomer of Seattle (Tr. p. 116), "stated that he had no recollection of any sales of tide lands west of the West Waterway in 1897, 1898 or 1899, excepting possibly that he heard of some in 1899, but did not recall a specific instance." (Tr. p. 116.) Yet, notwithstanding this, he states that he regarded the contract on block 430, on which only two payments had been made, as worth in 1897 \$5,000. (Tr. p. 115.) Mr. Bussell was then asked "whether he knew of any other sales west of the West Waterway prior to

1905, and he answered that he did not know, but he did hear of some sales west of the West Waterway in the fall of 1905.” (Tr. pp. 116, 117.)

A. P. Hill testified that he regarded tide land contract No. 728 on block 430, in 1897, as worth \$4,800. On cross-examination he testified that in 1897 there were no tide lands selling in the locality of this property, and that there was very little doing in tide lands until 1905. “That up to 1905 tide land west of the East Waterway, which included the section embracing Harbor Island and all west of it, *was regarded as speculative, and that it was held up to that time purely for speculative purposes.*” (Tr. p. 119.) These are all the witnesses appellee offered upon the value of these tide land contracts in 1897.

On behalf of the appellants Herbert S. Upper was tendered as a witness and testified: “That prior to 1900, * * * he did not know of any tide lands selling west of the West Waterway. That block 430 was way out in the water.” (Tr. p. 213.) “The witness further stated that in 1897 block 430 did not have very much value, and, upon being questioned as to what he meant by this, he stated that values in that section had not been established. That there had been very little business or demand. That the same condition prevailed in 1899. That these

conditions changed principally after the railroad excitement in 1905 or 1906.” (Tr. pp. 213, 214.)

George F. Dearborn was produced as a witness and stated that he had made a specialty of tide lands. “The witness testified that in 1897, ’98 and ’99 he did not know of any sales of tide lands west of the West Waterway.” (Tr. p. 214.) “That his firm dealt principally in tide lands nearer the city, and that in 1897 and ’98 by advertising extensively they were able to get rid of a very little tide-land property. That their property in which they sold these lots was on First Avenue South, in block 329. The witness stated that he did not think there was any market for anything located south of Atlantic Street or west of the East Waterway.” (Tr. pp. 214, 215.)

Joseph B. Hill, when asked as to whether these tide lands at this time had any market value, stated “They had not—they were purely speculative.” (Tr. p. 237.)

Mr. Baker stated that in 1897 there was no sale for this class of property; that everything was absolutely dead. (Tr. p. 259.)

It is conceded by every one that the activity in the tide land market came with the railroad excitement in 1905 and ’06.

The appellee hinges his case largely upon the

testimony of Francis Rotch and Lester Turner. It appears that Rotch has lived in Washington for 26 years, and in Seattle 17 years, having come to Seattle the year prior to the sale of these tide land blocks to Simpson. That he was employed by Mr. Simpson, first, as manager of the shingle department of the Simpson Logging Company, and after that he was Mr. Simpson's private secretary and kept Mr. Simpson's books. (Tr. p. 133.) He says that he received a notice from the Commissioner of Public Lands stating that there was a payment due on block 430, which was the occasion of his having a conversation with Mr. Simpson in reference to it. (Tr. pp. 134, 135.)

“That was in 1900; the end of 1900. I have refreshed my memory about that. He said, ‘yes,’ he said, ‘pay that,’ he says, ‘but that belongs to Charlie Baker,’ and then I said, ‘Shall I pay it?’ and he said, ‘Yes, pay it. And then I paid it and I made the entry of it in my books, and charged Mr. Baker with that payment. And that was all the conversation we had at that time, as I remember it.” (Tr. p. 135.)

About two years after, when he had another conversation with Mr. Simpson, he says Mr. Simpson stated to him: “Mr. Baker put that in my hands and I have held it in trust for him right along.”

(Tr. p. 136.) Upon cross-examination the following questions were asked and answers given:

“Q. (MR. SHANK). Mr. Rotch, when did these conversations—I mean, when did you recall that you had these conversations?

A. When did I recall them?

Q. Yes.

A. I think when you and Mr. Kelleher asked me about it, I ran back in my memory and they came up, that is all.

Q. I visited you, didn't I, at one time, and I asked whether you recalled anything that was said or done and you stated that you did not have any recollection of it, didn't you, at that time?

A. At that time I probably did, because this is the first that it had been brought to my attention.

Q. And this was about three months ago that I called on you and asked you those questions?

A. Three or four months ago, I could not say when.

Q. Since that time you have recalled it and told Mr. Kelleher of the fact?

A. Yes, Mr. Kelleher asked me about it also.”
(Tr. pp. 136, 137.)

Mr. Rotch stated that the foregoing was all that was said by Mr. Simpson. (Tr. pp. 137, 138.) Mr. Rotch then stated that Mr. Simpson was a very wealthy man, and one of the largest loggers on the Sound. That he was at all times reckoned as a man

of sterling integrity and honor, and was known for his upright and honorable dealings. (Tr. p. 139.) That he was never at any time associated with or connected in any way, directly or indirectly, with any effort to conceal, defraud or otherwise do harm in a business transaction. That he was a generous man, and with his friends he was most generous, and that with his friends there was practically no limit to his generosity. (Tr. p. 140.)

On redirect examination Mr. Bausman asked Mr. Rotch these leading questions:

“Q. Just the same, he told you, in substance, that he was carrying that property for Charlie Baker, or words to that effect.

A. Yes, sir.

Q. And that he never had any interest in it?

A. Yes.

MR. SHANK. No, he didn't say that.

MR. BAUSMAN. He said so now.” (Tr. p. 140.)

It is upon this testimony that the appellee seeks to largely hang his case. On recross-examination the following took place:

“Q. (MR. SHANK) Mr. Rotch, to get at this matter exactly, you mean now to state, as a part of this record, that he told you that he never had any

interest in that property—do you mean to say that Mr. Simpson told you in the conversation in 1902 that he never had any interest in this property?

A. That is what he said.

Q. That he, at that time, did not have any interest, or that he never had?

A. I charged it up to Mr. Baker's account.

Q. Did he tell you that he never had had any interest in the property, or that he didn't have an interest at that time in the property?

A. That I could not say; that was a long time ago, and I could not say.

Q. Well, which way do you want the record to stand?

A. I don't care.

Q. You can't say?

A. No." (Tr. pp. 141, 142.)

Mr. Lester Turner testified that he had lived in Seattle for 25 years. That in 1896, and for several years subsequent thereto, he had been in the banking business; was first cashier, and subsequently president of the First National Bank of Seattle of which Sol G. Simpson was a stockholder and a director. He says it was after the Klondike excitement in 1897 that he had his first conversation with Mr. Simpson about his tide land holdings—he says he thinks in 1898 or 1899. (Tr. p. 144.) It was in one of these conversations that Mr. Simpson told

him "that a portion of those lands belonged to Charlie Baker, that he was carrying the title for him, to accommodate him." (Tr. p. 144.) Within a year or two after in another conversation Mr. Turner states that Mr. Simpson told him "Baker didn't want it known that he had taken the property while he was receiver of the bank, and it might not bear investigation, and he was carrying it for him for that reason." (Tr. p. 145.)

The witness stated on cross-examination that this was all that was ever said about this tide land transaction. That Mr. Simpson was a man who stood high in the community. That his honor and integrity were unimpeachable, and he was always recognized as a dependable and upright citizen. (Tr, p. 146.)

ARGUMENT.

We have made a statement of the facts as they are disclosed by the record with little or no comment thereon, believing that the sequence of events and the circumstances surrounding each transaction bear such convincing proof of themselves as to require little or no supplementing. We have cited the record to bear out the statement of each fact, so that the court has in the foregoing statement the material facts in the case in the order of their occurrence and the testi-

mony bearing thereon. Every material fact accords with Mr. Baker's fair, honest and convincing dealing with his trust. The appellee, to succeed in this case upon the facts, must interpret all these acts and doings of the receiver, thus in accord with honest and upright dealing, as having been sinister and fraudulent in their entire purpose. Is this court willing, after the lapse of sixteen years and the clear and convincing evidence of Mr. Baker before it, and in the absence of five important witnesses whose voices are silenced by death, to interpret the motives of Mr. Baker as fraudulent, and take away from him property upon which he has spent \$10,977.13 to preserve, when the most optimistic tide land boomer that the appellee could produce at the trial testified that this property in 1897 was of a value less than one-half this sum? We do not believe this court will take such a view.

In January, 1897, the receiver, at the instance of the Comptroller of the Currency, took up these tide land contracts with the state. The acting comptroller, Mr. Coffin, stated in his letter of approval of this transaction that inasmuch as the contracts were assignable they could be disposed of at any time. Every possible effort was made to realize upon these tide land contracts—the creditors, stockholders

and the community generally having been circularized to this effect, but it was not until November, 1897, that Mr. Baker was able to sell any of them, having theretofore been offered only one dollar for each of the seven contracts which he held with the state, although he had made two annual installment payments thereon. He finally sold two of these contracts to Mr. Simpson at what he considered a profit of \$50.00 each. No more tide land contracts were sold or assigned until March, 1899, and it was at that time, when Mr. Simpson was turning over block 429 through Anderson to W. D. Hofius & Company, that Mr. Baker repurchased block 430 from Mr. Simpson, and gave his note for the purchase price, which he subsequently paid. Much has been said about the fact that Mr. Simpson should sell to Mr. Baker this block for that figure. Two important facts must be kept in mind: First, Mr. Simpson was identified with Mr. Baker's electric light and power company, and they both had a large expectancy from this. Mr. Simpson was brought into this upon invitation of Mr. Baker, and therefore more than the usual obligation existed between them, intimate friends as they were. Second, tide land values at that time were so inconsequential as to really not be regarded with very great seriousness.

Mr. Simpson carried this property in his name for Mr. Baker at his instance, because Mr. Baker had been greatly involved and was covered up with judgments, and did not get these cleared off until 1905, at which time his father died and he came into possession of property from his father's estate. It was then that he prepared to take over the title of this property from Mr. Simpson, and it was then that he reimbursed Mr. Simpson for all moneys that he had paid out in preserving the property, and purchased from Mr. Simpson lease No. 181, embracing the harbor area in front of and adjacent to this property.

It will be remembered that Rotch and Turner, in fixing the time of the conversations with Mr. Simpson, stated that they occurred from one to three years after Mr. Baker repurchased this property. It is a matter of interest that, although Mr. Simpson held these two blocks for a year and a half, no witnesses were found who could testify that Mr. Simpson during any of this time ever suggested that Baker had any ownership or title to this property. So, in fact, the testimony of Rotch and Turner accords entirely with Mr. Baker's testimony, because he says now, and has claimed all the time, that he repurchased this property in March, 1899.

We will further discuss the testimony of these two witnesses later.

The facts in this case as disclosed from the foregoing statement taken from the record are sufficient argument in themselves. We shall, therefore, take up the various assignments of error and discuss the legal questions arising therefrom. We shall group these assignments of error for brevity under certain general subdivisions that will be designated as we further present the case.

THE COURT ERRED IN PERMITTING FRANCIS ROTCH AND LESTER TURNER TO STATE CONVERSATIONS WHICH THEY HAD WITH SOL G. SIMPSON WITH REFERENCE TO THIS PROPERTY.

It was in the latter part of 1900 that Francis Rotch fixes the date of his first conversation with Mr. Simpson:

“Mr. Simpson was turning a great many things over to me and of course I opened a great deal of his mail, unless it was marked ‘Personal,’ and I came across a notice from the Land Commissioner saying that there was a payment due and interest due on Block 430, and so I went to Mr. Simpson and asked him whether I should pay it or not * * *. That was in the year 1900—the end of 1900. I have refreshed my memory about that. He said, ‘yes.’ He said ‘Pay that.’ He says, ‘That belongs to

Charlie Baker,' and then I said, 'Shall I pay it?' and he says, 'Yes, pay it.' And then I paid it and made the entry of it in my books and charged Mr. Baker with that payment, but that was all the conversation we had at that time as I remember it." (Tr. p. 89.)

And after a further question as follows:

"It came up again about two years later—I think 1902; I am not quite certain about that, and Mr. Simpson was hard up in those times. He had a good deal of property but did not have much money; and we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said: 'Now, can't we get rid of this Block 430?' I thought maybe at that time probably he got it from Baker or something of the kind. He said, 'No, Mr. Baker put that in my hands and I have to hold it in trust for him right along.' He said, 'We cannot dispose of that'." (Tr. pp. 89, 90.)

And further, in answer to a question by plaintiff's counsel:

"Q. Just the same, he told you in substance that he was carrying that property for Charlie Baker, or words to that effect?

A. Yes, sir.

Q. And that he never had any interest in it?

A. Yes."

Mr. Turner testified that in 1898 or 1899—he could not fix the date nearer—with reference to his conversation, as follows:

"The conversation came up in this way: I was

talking to Mr. Simpson in regard to tide land holdings that the bank held. It owned quite a large amount of tide lands and he was director of the bank, and I talked to him about the plans of the bank and in that connection I asked him about his own holdings down there. I knew that he held some tide lands. And he told me that a portion of those lands belonged to Charlie Baker—that he was carrying the title for him to accommodate him.” (Tr. p. 91.)

And also the following in response to a question as to a later conversation:

“I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way incidentally to the properties and I asked him how he came to hold the title to that property that belonged to Baker. ‘Well,’ he said, ‘Baker did not want it known that he had taken the property while he was receiver of the bank, and it might not bear investigation,’ and he was carrying it for that reason.” (Tr. p. 91.)

To the introduction of this testimony the appellants interposed objection that the same was hearsay, immaterial and irrelevant. The court permitted these witnesses to give this testimony upon the theory that it was a declaration by Simpson against his interest, and it is with this in view that we proceed to analyze the reason for this ruling. These witnesses both testified in substance that Simpson

stated that he was holding block 430 for Baker. If this testimony is true, Simpson had no interest in this block of tide land, and, therefore, the statement would not be against his interest. The only way in which it could be said that Simpson's statement to these two witnesses was a declaration against interest would be to believe what he said was false. If he did not hold it for Baker, then Mr. Simpson did not tell the truth, and his testimony would be disregarded. If he did hold it for Baker, then he had no interest in the property and his declaration would not be against interest, and, therefore, the testimony would not be competent. We respectfully submit that appellee must accept one or the other horns of the dilemma in which this theory places him with reference to the admission of this testimony, to-wit: That Simpson had no interest in the property, and, therefore, it is not a declaration against interest, or, if he had an interest in the property, then he told a falsehood when he made the statements to Rotch and Turner to the contrary effect.

THE APPELLEE CANNOT DO EQUITY.

The decree of the court directs the payment of \$10,977.13 to appellant by the present receiver, of

which \$8,130.19 is principal and \$2,846.94 interest; the “said principal being all the sums by the defendants expended in taxes upon the aforesaid Block 430 and Harbor Lease 181 and in payments directly or indirectly made to the State of Washington under the contract for Block 430 aforesaid and upon said lease, and should complainant fail so to do, he shall lose the benefits of this decree.” (Decree Tr. p. 82.)

The first pertinent inquiry is: Has the receiver this money, or assets out of which to obtain it? The receiver testified in this case “that as receiver of the Merchants National Bank no funds had come into his hands, and that at the present time he is without funds, and that there are no assets of the bank so far as he knows excepting the claim which he is asserting in this action.” (Tr. p. 190.) We need go no further than the testimony of the receiver himself to definitely prove that the receiver is without funds with which to pay this judgment, consisting of the payments that were made to the state and the taxes upon this property. We are then brought to the question of considering whether, if any creditors, stockholders, or other parties, who are speculating at the expense of the Comptroller of the Currency and of the receiver in this litigation, were to give the receiver this money,

the receiver could use that money for this purpose? We are presenting to the court under another head in this brief the power of the receiver to utilize funds in making purchases or payments contrary to the provisions of the statute. Any funds that might be contributed by people speculating in this law suit would become subject to the provisions of the law prescribing the extent to which these funds might be used for a purpose of this character. If the receiver could not have made the payments to the state from year to year out of the funds in his hands as these payments became due to the state, then certainly he cannot use the funds to reimburse another for having made these payments. This becomes at the present moment even more of a question than ever before. Up to one year ago the liability of Block 430 was subject to any lien or liens that might arise or be created in consequence of or pursuant to the provisions of the act of the legislature of the State of Washington providing for the filling of these tide lands. This act was approved March 9, 1893, and the contract No. 728, and all other tide land contracts, specifically provided in the body thereof that the contracts were issued subject to the provisions of this act. (Tr. p. 105.) While heretofore a lien was a mere possibility, now we are face to face with

an actual subsisting obligation, arising out of this right to fill, of some \$80,000 and interest. Hence, any money that the receiver might pay, whether it was his own or presented to him by speculators, would be paid out under order of the court upon property subject to a lien of more than \$80,000. In this connection we should not lose sight of the fact that after a lapse of sixteen years, while this property was developing from a valuation that was purely speculative, as was testified to by the appellee's own witnesses—one giving this speculative value at \$4,800 and the other at \$5,000—the property, according to the allegations of the bill, has now reached a valuation of \$300,000, and during this time the appellant Baker has paid out in the preservation of this property more than twice the estimated speculative value placed upon the property in 1897, when he acquired it.

In view of the fact that the law has provided no way by which the receiver could make these payments, and the receiver has no funds with which to perform even though he had the authority, we submit that this court will not now lend its power to extend to the receiver rights which the law itself withholds.

TESTIMONY TO ESTABLISH FRAUD MUST BE CLEAR,
UNEQUIVOCAL AND CONVINCING.

The appellee has sought to make out his case by the thinnest kind of circumstantial evidence. He seeks from it to convict Mr. Baker, Sol G. Simpson and A. H. Anderson, the last two not now being able to defend themselves or their good names, of a fraud that amounts to a felony. He has no direct evidence upon the point, nor any inconsistent with the facts as they have been disclosed by the appellants in a clear and convincing way. It must be the theory of the appellee that because one or two real estate men estimated the tide land contracts to have a speculative value in excess of that for which the receiver sold them, that this is a badge of fraud, such as to warrant the court at this distant day, after a lapse of between 16 and 17 years, fixing in the appellee title which the appellee never had any right to acquire and could not hold, and if it involved the expenditure of any money the appellee in this action would not be authorized under the statute to invest funds in such a venture. The fact is the appellee has admitted that he has no assets, excepting the claim in this suit.

In the case of *United States vs. Maxwell-Land*

Grant Co., 121 U. S. 325; 30 L. E. 949, 959, the court, quoting from the opinion of Mr. Justice Strong in a former decision, says:

“ ‘Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them.’ * * *

“We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.”

Fortunately we have a wealth of decisions by the Supreme Court of the United States upon every branch of the case at bar. We invite the court's attention to the case of *Prevost vs. Gratz, et al.*, 6 Wheat. 481; 5 L. Ed. 311, 315. Mr. Justice Storey delivered the opinion of the court and says in forcible terms:

“It is certainly true, that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not upon principles of eternal justice, to be admitted to repel relief. * * * But length of time

necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of memory, and human infirmity, is, that the material facts can be given with certainty to a common intent; and, if the parties are dead, and the cases rest in confidence, and in parol agreements, the most that we can hope is to arrive at probable conjectures, and to substitute general presumptions of law, for exact knowledge. Fraud, or breach of trust, ought not lightly to be imputed to the living; for, the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt."

A case from the 8th Circuit, that of *Maston vs. Noble*, 157 Fed. 506, quoting from page 508, says:

"Another well-established general rule governing courts of equity in cases of this kind which should be borne in mind is that the evidence adduced to set aside a written instrument for fraud must be clear, unequivocal, and convincing. *Atlantic Delaine Co. vs. James*, 94 U. S. 207; 24 L. Ed. 112; *Maxwell Land-Grant Case*, 121 U. S. 325, 380; 7 Sup. Ct.

1015; 30 L. Ed. 949; *United States vs. Budd*, 144 U. S. 154, 12 Sup. Ct. 575; 36 L. Ed. 384; *Chicago, St. P. M. & O. Ry. Co. vs. Belliwith*, 28 C. C. A. 358, 83 Fed. 437. In the first of these cases the Supreme Court said: 'Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear, never for alleged false representations, unless their falsity is certainly proved'."

This Court has likewise spoken on this very important subject in the case of *Holton vs. Davis et al*, 108 Fed. 138, quoting from page 150:

"* * * As to the character of proof necessary to sustain the charges it must constantly be borne in mind that fraud is never presumed. It may, however, be inferred from facts and circumstances connected with the transactions; but in all cases of this character the fraud, collusion, or conspiracy alleged in the bill must be proven to the satisfaction of the court. The proof upon these points, in order to entitle complainant to any relief, must be clear, distinct, and certain. If there be any doubt or uncertainty, the relief asked for should be denied. 3 *Enc. Pl. & Prac.* 628, and authorities there cited; *Boyden vs. Reed*, 55 Ill. 458, 464; *Doughty vs. Doughty*, 27 N. J. Eq. 315, 320; *Baltzer vs. Railroad Co.*, 115 U. S. 634, 6 Sup. Ct. 216, 29 L. Ed. 505, and authorities there cited; *Lalone vs. U. S.*, 164 U. S. 255, 257, 17 Sup. Ct. 74, 41 L. Ed. 425. In the case last cited the court said:

"'The rule is of long standing, and is of universal application, that the evidence tending to

prove the fraud, and upon which to found a verdict or decree, must be clear and satisfactory. It may be circumstantial, but it must be persuasive.' "

Analyzing the evidence in this case in the light of these decisions, what do we find? The books of the receivership show the sale of contracts No. 727 and No. 728 to Sol G. Simpson, and the price paid therefor. If the receiver had sought to conceal anything in connection with this sale, he might well have omitted the name of Mr. Simpson. The special examiners in looking over these books knew that the sale had been made to Simpson, and at what price. They knew, as the books disclosed all these facts clearly, that the receiver had received for each of these two contracts \$50 above the one payment made the state. No objection seems to have been made. Is there anything in this that would indicate fraud? On the contrary, these facts are spread out upon the books of the receivership as plainly as any other fact disclosed by these records. Further, these contracts had been a part of the record and files of the receivership up to the time they were sold to Mr. Simpson, and they were then assigned and delivered to him. This fact was known to the examiners. A special examination was made by Mr. Wing touching these tide land

contracts. Mr. Wing interviewed Mr. Simpson and Mr. Anderson, and apparently was entirely satisfied with the facts as he learned them. Dealing with this evidence in the fairest manner, there is not one item of testimony inconsistent with the facts as testified to by Mr. Baker, and from which fraud can be inferred. If it is to be concluded that any of those acts were fraudulent, then fraud must be *imputed* to these otherwise lawful and orderly acts of the receiver. The testimony of Rotch need not be seriously considered, because we do not believe that the manner of his testifying, and the way in which the statement was drawn out of him upon redirect examination by a leading question, will have any weight with this Court.

Much emphasis was placed by counsel during the trial upon the fact that the receiver did not specifically mention block 430 in his reports. Surely this cannot be regarded seriously in the light of all the other facts showing that the receiver kept these tide land contracts in his books by their numbers. The State Land Commissioner kept them by numbers, and when these various letters were received bearing upon block 430 they were directed to be filed with tide land contract No. 728, not with tide land block 430. (Tr. p. 254.) The constant

handling of these tide land blocks was by numbers and not by blocks. The reports upon these sales and with reference to these tide land contracts were as full and explicit as the reports upon any other item of business of the receivership. Much was said about Schedule E under which the receiver made a report of the sale to Simpson. But we do not see how it could have been made much plainer unless the receiver had attached a photograph of the property and of the purchaser to the report. If Columbus T. Tyler, who is now dead, were here to testify he might throw some light upon just why the reports were made in all particulars as they were. They were upon forms furnished by the Comptroller. Here again the appellants are shorn of testimony by lapse of time, which is not explained by the appellee. At any rate the manner in which these contracts were handled would not have permitted of the possibility of an error. When these contracts were issued by the Commissioner of Public Lands they were in duplicate. One copy was retained by the Commissioner of Public Lands, and the other was delivered to the receiver and formed a part of the physical assets of the trust, and in the possession of the receiver. (Tr. p. 276.) When the sale was made to Mr. Simpson, the copy which the

receiver had was assigned and delivered to Mr. Simpson, and the contract was no longer a part of the securities on file with the receiver, (Tr. p. 276) but the money was put in its place, (Tr. p. 194) and was then transmitted to Washington in the next quarterly report. (Tr. p. 200.)

LACHES AND THE STATUTE OF LIMITATIONS AS APPLIED TO THIS CASE.

In his bill the appellee alleges as follows:

“The facts herein alleged were wholly unknown to any of the creditors and stockholders of said bank, and to plaintiff and the Comptroller of the Currency until the year 1913, and were, until that time, concealed from them by the defendants, as above set forth, and were first discovered by the Comptroller of the Currency on or about the 1st day of February, 1913.” (Tr. p. 12.)

No further allegation whatsoever is made to justify the delay of sixteen years in bringing this action. No effort is made in the bill to bring the case within the decisions of the Supreme Court of the United States and other leading decisions upon the question of laches by alleging *what* was discovered, *how* such discovery was made, and *why* it was not made sooner. These become important questions, particularly in view of the fact that the

appellee's witnesses were all old time residents of the City of Seattle. Mr. Reed, the son-in-law of Mr. Simpson, is a native born; Mr. Rotch has resided in the State twenty-six years and in Seattle seventeen years. Mr. Turner has resided in Seattle twenty-six years. There is nothing in the bill, nor in the proof, which does not negative the possibility that all the facts which the appellee now brings forward at this late day, and after the death of all the principal witnesses, were not known years ago, and the delay in the action was simply awaiting until time had reaped its harvest among the chief witnesses and then bring forward this cause of action.

Before discussing the facts at length as they effect these questions now under consideration, let us inquire as to the law upon these questions.

Sec. 159, Sub-sec. 4, *Rem. & Bal. Code*:

An action for relief upon the ground of fraud, can only be commenced within three years after the cause of action shall have accrued, but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

The English statute, that of 3 and 4 William IV, enacted:

“The cause of action is deemed to have accrued, and not before, the time at which such fraud shall, OR WITH REASONABLE DILIGENCE MIGHT, have been first known or discovered.”

That portion of the statute which provides that the action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud had its origin in equity. Equity courts took the view that actions for relief on the ground of fraud are not affected by the lapse of time, however long, so long as the appellee remains, *without any fault of his own*, in ignorance of the fraud. But equity aided the diligent and not the negligent; was opposed to stale claims, and would not permit a party to prolong by his own laches the time during which he might apply for relief. The time within which the party aggrieved might bring his action after discovery of the facts constituting the fraud, or *after the time when he ought to have discovered them*, was a matter to be determined wholly upon the discretion of the chancellor. Also if the action was founded upon occurrences that had transpired a long time before and appellee alleged that he had not discovered the fraudulent facts until recently, the question of

whether or not he had been guilty of laches was likewise a discretionary matter for the chancellor.

The statute in substantially the terms of the Washington statute has been enacted in a large number of the states, though some states have enacted it in the form of the statute of William IV.

Of the states that have enacted the statute in the form of the Washington statute, all, save possibly the State of Kansas, have construed the statute in the light of equity so that the statute, as interpreted, practically reads that the action shall not be deemed to have accrued until the party aggrieved shall have discovered, OR OUGHT TO HAVE DISCOVERED, the facts constituting the fraud. Therefore, the only discretion that the chancellor exercised, of which the statute has deprived the modern court, is the limit placed upon the time for bringing the action after actual or implied knowledge of the fraud—the question of whether or not the plaintiff has been diligent, if the action is commenced after the expiration of the statutory period, still being a question for the discretion of the court.

Therefore, where an action is brought after the expiration of the statutory limit (three years in Washington) it behooves the appellee to *aver* and *prove* (the burden being upon him) that his action

is covered by the "saving clause" of the statute—that is, that the apparent bar or laches was not due to any fault or lack of diligence on his part.

"The burden is on the plaintiff to aver and prove that he did not discover and could not reasonably have discovered the fraud or concealment prior to the statutory period before bringing suit."

19 *Am. & Eng. Enc. Law*, 333.

In the case of *Felix vs. Patrick*, 145 U. S. 317, 36 L. Ed. 719, 726, decided in 1891, the bill was dismissed on demurrer because of plaintiff's laches, the court saying:

"While, as alleged in the bill, their discovery of this fraud may have been contemporaneous with their becoming citizens of the United States, there is no palpable connection between the one fact and the other, and we think the bill defective in failing to show how the fraud came to be discovered, and why it was not discovered before. A simple letter to the Land Department at any time after this scrip was located would have enabled them to identify the land, and the name of the person who had located it; and it is difficult to see why, if they had ever suspected the misuse of this scrip, they had not made inquiries long before they did, * * * 'the party who makes such appeal should set forth in his bill, specifically, what were the impediments to the earlier prosecution of his claim; * * * otherwise the chancellor may justly refuse to consider his case, upon his own showing, *without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.*'"

The leading case upon this question is that of *Hardt vs. Heidweyer*, 152 U. S. 546, 38 L. Ed. 548, 552. This case was decided in 1894. A failing debtor paid to some of his creditors sums largely in excess of their demands by giving notes and having judgment immediately entered thereon. It was held in this action that laches for a period of only five years barred the action. The plaintiff alleged that he had caused an investigation to be made at the time of the failure and shortly after rendition of the judgment on the notes, but that the preferred creditors represented that the notes were given in settlement of *bona fide* claims against the debtor and were not in excess of their claims. The plaintiff also further alleged that the defendants had fraudulently concealed the fact of such excessive payments made in pursuance of a design to appropriate substantially all the assets of the debtor. The action was dismissed on demurrer. Mr. Justice Brewer wrote the opinion of the court and reviewed a large number of cases and set forth at considerable length the requirements of the bill where the plaintiff sought to avoid the presumption of laches or the bar of the statute. This is an able discussion upon a vital question that is now before this Court in the case at bar. The court says:

“It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also *when* and *how* knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts. Thus, in *Stearns vs. Page*, 1 Story, 204, 215, 217, Mr. Judge Story observed:

“General allegations, that there has been fraud, or mistake, or concealment, or misrepresentations, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject-matter. And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches. * * *

“On appeal this decision was affirmed, 48 U. S. 7 How. 819, 12 L. Ed. 928 * * *.

“Similar declarations may be found in several subsequent cases: *Badger vs. Badger*, 69 U. S. 2 Wall. 87; 17 L. Ed. 836, in which is found this quotation:

“The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when

he first came to a knowledge of the matters alleged in his bill.'

"*Godden vs. Kimmell*, 99 U. S. 201, 211, 25 L. Ed. 431, 434; *Wood vs. Carpenter*, 101 U. S. 135, 140, 25 L. Ed. 807, 808, in which this court said:

" 'A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated *when it was made, what it was, how it was made, and why it was not made sooner.*'
* * *

"Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed. * * * Plaintiffs * * * made no inquiry or challenge of the integrity of the transaction for nearly five years. Such indifference and inattention must be adjudged laches. Upon this ground alone, * * * the decree of the Circuit Court (dismissing on demurrer) is affirmed."

Let us stop for a moment now and consider the evidence in the case. By what testimony can the appellee seek to avoid the effect of this rule of law that it is incumbent upon him to prove when and how he discovered the facts which he sets forth in his bill, some of which he has attempted to prove at the trial? Is there anything in this case that indicates *when* the appellee became possessed of

the information that Mr. Rotch or Mr. Turner testified to, or that is embraced in the writings and other documentary evidence? May not the appellee, or the Comptroller, or the creditors or stockholders of the Merchants' National Bank, or all of them have known of these facts for fourteen or fifteen years? The appellee has wholly failed to disclose when any of this evidence came to his knowledge. The case now stands upon the bare allegation of the bill that these facts were wholly unknown to the appellee prior to February, 1913.

The appellee fails in another vital point to disclose to the court *how* he discovered these facts. It is not for a litigant who has suffered the statute to run five times its length to come into court and ask for relief without explaining how these facts were disclosed, so that the court may judge as to whether the means of ascertaining these facts were not as completely available fifteen years ago as now. There is nothing to indicate how they came to learn that Mr. Turner or Mr. Rotch might be possessed of some of these facts. There is nothing to indicate how they became acquainted with the fact that Mr. Mark Reed, a son-in-law of Sol G. Simpson, might be possessed of some of these facts. It does appear upon the face of the record that

Mr. Turner and Sol G. Simpson were identified together in the First National Bank; that Mr. Rotch was a clerk of Mr. Simpson; that Mark Reed was a son-in-law of Mr. Simpson; that all these men had resided in this community for the last sixteen years. Now what is there in this record that discloses to this Court why these parties could not have learned all that these men testified to as well fifteen years ago as now? There is an entire absence of evidence disclosing to the Court when or how the appellee became possessed of any of this information, but now, after a lapse of over sixteen years, after Sol G. Simpson has been dead for eight years, and Mr. Seeley, the special bank examiner, upon whose recommendation these assets were sold by Baker as receiver and who secured the order of the court for the sale thereof, is dead; after Mr. Columbus T. Tyler, the bookkeeper of the receiver and who made out the reports, is likewise dead; after Mr. Hofius, of W. D. Hofius & Company, the man who purchased some of these tide lands in 1899, is dead; after Mr. Anderson, another one of the principal participants in these transactions, came to a point in life where he was suffering from an incurable disease which had so badly affected his memory and health that he had lost all

trace of events, and from which disease he died within a few days after the trial, will the appellee be permitted, under all these circumstances, to receive at the hands of this Court favorable consideration and not disclose to the Court when and how he became possessed of every particle of information which has been produced at this trial? This Court does not know at the present time but that the appellee, the Comptroller of the Currency, the stockholders and the creditors of the Merchants' National Bank are the ones who have systematically concealed all the information about this bank until all these principal witnesses shall have died, and then pounced in upon Mr. Baker, left shorn of all the evidence he might have produced had the appellee brought this action in season.

The appellee is seeking equity and, after so great a lapse of time, when the circumstances of all transactions must necessarily more or less fade from one's recollection, there must be the clearest and most convincing proof that the appellee has used all due diligence, and the only way this can be demonstrated to the Court, as has been so clearly held by the Supreme Court of the United States as necessary, is to disclose when he came into possession of these facts and how he came into their

possession, so that the court may determine from this evidence whether the appellee has acted with all due diligence.

The appellee asserts to this Court that he has discovered certain conversations had between Sol G. Simpson and Mr. Rotch. Those conversations were had about fourteen years ago. Mr. Rotch has resided in this vicinity all this time. When, in these fourteen years, did the appellee discover this evidence, and how did he come to discover it? If it is because of the fact that Mr. Rotch was the secretary of Mr. Simpson, it must be assumed that every one who knew Mr. Rotch in those days knew his relations with Mr. Simpson and he could have been inquired of as to this matter a dozen or more years ago as well as now. Mr. Lester Turner has resided in this community for a quarter of a century. Every one knowing Mr. Turner is familiar with the fact that he and Sol G. Simpson were associated together in the affairs of the First National Bank and were upon its board of directors at the same time. This is no new fact and the appellee cannot say that he has so recently discovered this. What led the appellee to search for Mr. Turner or Mr. Rotch to get this statement from them? The

record is as silent as the graves of the five dead men who would be important witnesses here.

As Mr. Justice Brewer has so well and forcibly said: "A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff make any particular discovery it should be stated *when* it was made, *what* it was, *how* it was made and *why* it was not made sooner." The record is absolutely silent upon these controlling and important points.

WHAT CONSTITUTES DISCOVERY WITHIN THE MEANING OF THE STATUTE?

Whether or not the appellee has slept on his rights is to be determined by the facts in each particular case. There are a multitude of circumstances that enter into a decision of this question.

Mr. Justice Brown in the case of *Patterson vs. Hewitt*, 195 U. S. 310; 49 L. Ed. 217, announces in forcible language some of these considerations. In this case the plaintiffs filed their bill in 1893 against the defendants to enforce a trust, which is alleged to have existed between the plaintiffs and the defendants, by which they sought to recover one-fourth interest in two locations made in the name of the defendants nine years previously. The bill

prayed for an accounting. The property had very materially increased in value. The court says:

“The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if the day after, it will be defeated. *In suits in equity the question is determined by the circumstances of each particular case.* The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed, complainant’s knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control—are all material to be considered upon the question whether the suit was brought without unreasonable delay.”

The same general doctrine is announced in *Ferrell vs. Lord*, 43 Wash. 667, where our Supreme Court clearly holds:

“Where a case is of purely equitable cognizance, in the application of the doctrine of laches courts

of equity act upon their own inherent doctrine of discouraging, for the peace of society, ancient demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights.”

This Court in the recent case of *Newberry vs. Wilkinson*, 199 Fed. 673, 688, which is a case arising in Spokane, speaks with no uncertain terms upon this important question. When the plaintiff was nineteen years of age in a conversation with his stepmother she told him that if he would bring a suit he might recover an interest in his mother’s property, referring particularly to the Carnegie Library site. This is the only suggestion or information which he had on the subject, and four years afterwards he brought the suit on account of misconduct of his guardian, and he was denied the right to prosecute the case on the ground of laches.

“It is one of the settled general rules in this class of cases that if the party seeking to avoid the operation of the statute of limitations, or to excuse the delay which would, in the absence of a sufficient excuse, amount to such laches as would defeat his right of action, possessed information or knowledge of extraneous facts and circumstances, or, in other words, of matters in pais, which, although not directly tending to show the existence of a prior conflicting right, are sufficient to put him, as a prudent person, upon inquiry, he is then charged with constructive notice of all that he might have learned

by an inquiry prosecuted with reasonable diligence. *Pom. Eq. Juris.* §610. It is said by the same author that from the existence of such circumstances 'the legal presumption arises that he has obtained information of what he might have thus learned. In every such case the first question is whether the facts of which the party has information are sufficient to put him upon an inquiry, so as to raise the *prima facie* presumption. The further question is then presented whether he has made a due inquiry without discovering the truth, so as to overcome the presumption and defeat the notice, or whether he has so neglected this duty that the presumption remains unshaken and the notice effective.' "

"Again, the court says, in *Nash vs. Ingalls*, 101 Fed. 645, 648, 41 C. C. A. 545, 548:

" 'The law requires that, in order to relieve himself from the consequences of delay in seeking a remedy for a wrong, the party should have given reasonable attention to his own affairs, and he is chargeable with knowledge of such facts as such reasonable attention would have afforded him.' "

"So also, in *Foster vs. Railroad Co.*, 146 U. S. 88, 99, 13 Sup. Ct. 28, 32 (36 L. Ed. 899):

" 'The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.' "

The Supreme Court of the United States in the case of *Gallagher vs. Cadwell*, 145 U. S. 368; 36 Law Ed. 738, reviews at great length the cases bear-

ing upon what constitutes laches. This case arose in the City of Tacoma, and was an action to quiet title. The question as to the increase of the value of the property was one of the things that entered into the decision of this case. Mr. Justice Brewer, after reviewing many cases, says:

“But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation; a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.”

The court refused the relief prayed for because of the large increase in the value of this property between the time when it was alleged the acts occurred out of which the action grew, and the time of bringing the suit.

The case of *Duxbury vs. Boice, et al.*, 72 N. W. (Minn.) 838, is well considered and bears directly upon the question of what constitutes discovery. This was a case to set aside a conveyance on the ground that it was made with intent to defraud creditors, and to subject the granted premises to the payment of a judgment. The debt on which the judgment was rendered matured in 1878; the conveyance attacked was executed in 1881, and re-

corded forthwith. This action was begun in 1893, nearly 12 years after the alleged fraudulent conveyance, and about nine years after the rendition of the judgment. The court says:

“In granting relief on the ground of fraud the foundation principle of courts of equity was that the party defrauded is not affected by the lapse of time so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed. * * * But equity aided the diligent, and not the negligent. It was opposed to stale claims, and would not permit a party to prolong, by his own laches, the time during which he might apply for relief. Hence in actions in equity, the rule was that the means of knowledge were equivalent to actual knowledge; that is, that a knowledge of facts which would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of the fraud, was equivalent to actual discovery. Hence, in equity, where there was no statute of limitations, but merely an application of the doctrine of laches, the burden was on the plaintiff not merely to prove that he did not, in fact, discover the fraud until within a reasonable time before he filed his bill, but also to show by the facts and circumstances connected with the fraud and its discovery that his failure to discover it sooner was consistent with reasonable diligence on his part, and not the result of his own negligence. * * * But in every instance, so far as we are aware, the courts have construed such statutes in accordance with the equity rule, and hold, without reference to the particular language used, that the means of discovery are equivalent to actual discovery, and that a party must be deemed

to have discovered the fraud when, in the exercise of proper diligence, he could and ought to have discovered it.”

Again, in the case of *First National Bank of Shakopee vs. Strait*, 73 N. W. (Minn.) 645, we find this doctrine well expressed. Strait, Howe, *et al.* were partners in a flour milling enterprise. Strait and Howe were also president and cashier, respectively, of the plaintiff bank. In 1885 and prior the bank held the note of the milling company for \$10,000. In October, 1885, Howe (possibly with the knowledge of Strait) accepted the renewal note of the milling company to take up the original note. The renewal note was due January 1, 1886, but in November, 1885, Howe stamped it “Paid”, and attached thereto his personal note to cover it. That the note had not been paid was kept from the board of directors until 1893 when Howe died, and Strait died shortly thereafter. The renewal note was given a bank number and kept in the bills receivable book. Howe died insolvent, and this is an action against Strait’s administrator. The milling company’s property had burned and the partnership had terminated in 1887. This action was begun and the partnership had terminated in 1887. This action was begun between eight and nine years after the

renewal note matured. The Minnesota statute is substantially the same as the Washington statute, except that the Minnesota period of limitation is six years. For the purpose of taking the case out of the statute plaintiff alleged that Howe and Strait fraudulently concealed from it that the original note was renewed instead of being paid, and falsely stamped the renewal note as paid, and fraudulently concealed the fact that the latter note and the debt which it represented had not been paid, and that the bank did not discover the facts constituting the fraud until 1894. The court said:

“The burden was on the plaintiff to prove the fraud, and that it did not discover it until within six years before the death of Horace B. Strait. *
* * But the facts constituting the fraud are deemed to have been discovered when with reasonable diligence they could and ought to have been discovered. The mere fact that the aggrieved party did not actually discover the fraud will not extend the statutory limitation if it appears that the failure to sooner discover it was the result of negligence, and inconsistent with reasonable diligence. * * *
The directors of the bank had monthly meetings; also an examining committee, whose duty it was to examine the books and assets of the bank.”

Shiras, Judge, in *Thompson vs. German Ins. Co. et al.*, 77 Fed. 258, discusses this principle of law with great clearness.

Bill by receiver of an insolvent national bank to collect an assessment made by the comptroller on 100 shares of stock defendant owned until about six months before the bank was closed by the comptroller. Plaintiff alleges that defendant transferred this stock without consideration to one Koehler, who was judgment proof, for the purpose of escaping liability on it. Fifty shares were transferred to Koehler in September, 1890, and 50 shares in January, 1891, and the bank was closed and receiver appointed in July, 1891, and that 90% assessment was made upon all stock in August, 1892. This action was begun in October, 1896, over four years (the statutory limit in Nebraska) after the assessment became due. The first receiver appointed in 1891 served until January, 1895; whereupon the present receiver, plaintiff Thompson, was appointed. It was averred that the fraudulent acts recited were not known to the comptroller nor to the receivers appointed by him until in February, 1896. The court said:

“If a party suffer an injury or wrong by reason of a fraud practiced by another, his right to a remedy in equity will not be affected by the lapse of time until discovery of the fraud is had, provided he is not guilty of negligence in ascertaining the facts.”

The court quotes approvingly from *Hardt vs. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. 671, and *Wood vs. Carpenter*, 101 U. S. 135. The court further says:

“When the receiver was appointed, and the comptroller ordered the assessment * * * it became the duty of the receiver to enforce the payment of the assessment thus made * * * and the proper performance of this duty required action on his part. The books of the bank, which were, of course open to the receiver, showed that the insurance company had transferred the stock in question to Koehler. As the assessment upon these 100 shares of stock was not paid by the present holders, it was incumbent upon the receiver to take steps to enforce the payment; but it is not shown that any action was taken to that end. It is averred in the bill that Koehler at the time of the transfer of the stock to him was an attorney, residing at Omaha; that he was in the employ of the insurance company, and was without capital. It is not averred that these facts were not in fact known to the receiver from the date of his appointment. * * * It is clear that this denial of knowledge cannot be intended to apply to the fact of the transfer of the stock by the insurance company to Koehler, and to the subsequent transfer thereof recited in the bill, because these appear on the books of the bank, and must have been known to the receiver. * * * It must be held that the receiver knew, or else was grossly negligent in not knowing, that the insurance company had transferred the stock in question to Koehler; and the means of knowledge were open to the receiver to ascertain all that is now charged in the bill with regard to Koehler. It is not averred that the receiver ever made the slightest inquiry

into the facts of the transfer to Koehler, or of the subsequent transfers of the stock that are set up in the bill. * * *

“And as it is not averred that the complainant ever made an inquiry, or did anything looking to an ascertainment of the facts surrounding the transfer of the stock to Koehler, it follows, if complainant’s theory is correct, that by simply remaining wholly inactive the complainant could prevent the statute from beginning to run. On behalf of the diligent, equity holds that in cases of fraud the limitation begins to run from the discovery of the fraud, or from the discovery of facts sufficient to put a prudent person on inquiry; but to the negligent equity grants no relief.”

This is a clear-cut case, is not complicated by the death or incapacity of any of the parties, any change in values, nor by any interests of innocent third parties. It will be noted that many of the circumstances and facts surrounding it are identical with the case at bar, and the period of laches was for only a little over four years.

The case of *Wood vs. Carpenter*, 11 Otto 135, 143; 25 L. Ed. 807, 808, is a leading case bearing upon this question. The plaintiff had recovered a judgment against the defendant in 1860. The defendant in the year 1850 entered into a fraudulent conspiracy with his brother to encumber his real estate and hide away the title so that the property should not be sold to pay his debts, but in the end

to inure to his benefit, and thereafter transferred the title to all his real and personal estate to his brother, thus preventing plaintiff from levying executions upon his judgments. In 1864 the judgments were sold to a relative of the defendant for 50% of their principal and interest, after which title to the property was transferred back to the defendant. It was not until about this time that the plaintiff had actual knowledge of the fraudulent conveyances. The statute of limitations was set up as a defense. On the question of the records the court recites as follows:

“The conveyances to Alvin and Keller were on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clue in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. * * *

“ ‘The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.’

“A party seeking to avoid the bar of the Statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it.”

To the same effect is *Teall vs. Slaven*, 40 Fed. 774, 780, where the court says:

“* * * ‘the party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clew to the facts which if followed up diligently, would lead to a discovery is, in law, equivalent to a discovery—equivalent to knowledge.’ * * *”

No better discussion of this important question is found than that by Chief Justice Fuller in the case of *Hammond vs. Hopkins*, 143 U. S. 224, 274; 36 L. Ed. 134, 153. This was an action to charge former trustees of the estate of plaintiff's ancestors who had perpetrated alleged frauds by purchasing through a third party portions of the *trust res*. This action was begun nineteen years after the commission of the alleged fraud. The sale of the property to the “dummy” was a matter of record, as was also the subsequent conveyance from the “dummy” to the trustees. Also the accounting of the trustees with the Orphan's Court was open to the plaintiffs, from which records any fraudulent acts of the trustees could have been ascertained. Plaintiffs allege that they obtained actual knowledge of the fraudulent acts only a few days before the bringing of the action, when an attorney who had interested himself in the case had investigated the

records and ascertained the fraudulent conduct of the trustees. The court says, page 153:

“Where there has been no change of circumstances between the parties and no change with reference to the condition and value of the property, a court of chancery will run very nearly if not quite up to the measure of the Statute of Limitations as applied in analogous cases in a court of law. But where there has been a change of circumstances with reference to the parties and the property, and still more where death has intervened, so that the mouth of one party is closed * * * the courts limit very much, in such cases, the measure of time within which they will grant relief.

“In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hour glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused.”

What are the facts in this case, which it may be said existed, which if followed up would have put this appellee upon notice that Baker since March, 1899, has been the owner of the property, and that since 1905 has made no secret of such ownership.

In the first place the evidence shows that Mr. Baker's enemies were constantly on the watch to

find some ground upon which to criticise his administration as receiver. The sale of these tide land contracts No. 727 and No. 728 called forth such criticism by Mr. Baker's enemies in the opposition electric power companies that the Comptroller of the Currency sent Mr. Wing, a special examiner, to Seattle for the specific purpose of investigating this transaction. (Tr. p. 267.) After Mr. Wing had made the usual examination of the books and affairs of the receivership and finding everything regular, he then stated to the receiver that he had been particularly charged to investigate the complaints with reference to the purchase by Anderson and Simpson of these tide lands. The examiner did not state further the extent of these complaints. (Tr. p. 268.) Mr. Wing was informed of the prices at which these contracts had been sold, and he went to West Seattle and examined the tide lands themselves, in so far as such tide lands covered deeply with water at low tide and located at the nearest point a half mile from the shore, were a subject of examination. The receiver then discussed with Mr. Wing the value of these tide lands and the market conditions surrounding them. Mr. Wing then interviewed Mr. Simpson and Mr. Anderson, and a great many people around Seattle, including bankers and

business men. (Tr. pp. 230; 267-269.) Mr. Wing then reported to the Comptroller of the Currency as to the result of his investigation. (Tr. p. 268.) It seems, after Mr. Wing took a view of this property, he interviewed the receiver, Mr. Simpson, and Mr. Anderson with reference to the transaction, investigated among the citizens, including bankers and business men, of Seattle, as to the value of these tide lands, that he became convinced that the transaction was a *bona fide* one, and was for the interest of the receivership. This report of Mr. Wing to the Comptroller of the Currency must be accepted as to the facts which could be proven if Mr. Anderson and Mr. Simpson were alive. It must be accepted also as an approval by the Comptroller as to what Mr. Baker did at that time, and the appellee will not now be permitted, after a lapse of sixteen years and the intervening deaths of these important witnesses, to go back and open up a subject which was then closed. The Comptroller of the Currency was then put upon notice by Baker's enemies that these transactions should be inquired into; he made the investigation; satisfied himself as to the correctness of the transactions and of their *bona fide* character, and yet today another person occupying the same official position seeks to go back these long

years and make a new inquiry after such lapse of time as does not permit of establishing by living witnesses the truth of these transactions, as was evidently learned at that time and which was sufficient to satisfy the Comptroller of the Currency that they were all right.

At the risk of repetition we inquire again why the appellee did not have Mr. Wing present to testify, if he is still living—which we do not know—or, in the absence of Mr. Wing, why his written report was not introduced in evidence, or its absence in some way explained? The appellants could not do it, and in fact were denied the right upon the objection of the attorneys for the appellee to interrogate the Comptroller upon the simplest questions which affected this case vitally. (Tr. p. 73.) But we need not stop with the report of the special examiner, Mr. Wing, and the subsequent approval of the Comptroller of the Currency. In April, 1899, receiver Frater and his attorneys were put upon notice to make a searching inquiry into all of these matters, and the matters were submitted to the attorneys for the receiver and they investigated them and stated that the same were regular. (Tr. p. 171.) All five of the witnesses who are now dead were then living, and if they were not interviewed

and the attorneys for the receiver satisfied from that source, it is fair to presume that had they made the investigation of the facts then, as had Examiner Wing done a year previously, they would have come to the same conclusion as Examiner Wing. We have therefore then the benefit of the approval of these transactions by two different parties, who had the benefit of the testimony of which we are now deprived, and we submit it is only fair to say that if Anderson, Simpson, Seeley, Tyler and Hofius were now living, or if Wing was obtainable, the appellants today would be able to establish from the same sources, with the same convincing testimony, the *bona fides* of these transactions as it had been established on two previous occasions.

In 1905, Mr. Baker paid Mr. Simpson what was due him, and at the same time purchased Harbor Area Lease No. 181 and paid him therefor. As a part of this transaction he gave to Mr. Simpson's agent and son-in-law, Mr. Reed, a check for the balance due the state on account of the tide land contract, and this personal check of Mr. Baker was sent to the Commissioner of Public Lands, was there protested and passed back through the banks. Mr. Reed then wrote to the Commissioner of Public Lands calling his attention to this Baker check, and

asking him to withhold the issuance of the tide land deed until the check was paid. This all constituted a part of the records of the Commissioner of Public Lands in 1905. The letters were filed with these contracts.

Again, Mr. Baker himself wrote to the Commissioner of Public Lands on October 16, 1904, making inquiry about the Harbor Area Lease in front of this block. Again, Brockett wrote several letters to the Commissioner of Public Lands with reference to this block, and the letters were filed with tide land contract No. 728. These letters written by Mr. Brockett were upon the letterhead of the Seattle-Tacoma Power Company, which designated Thomas B. Hardin as general attorney, and Norwood W. Brockett as the assistant attorney. It was commonly and universally known in Seattle that Mr. Hardin and Mr. Brockett were the personal attorneys of Mr. Baker and his interest. (Tr. p. 273.) Again, in 1907, Judge Frater, who sat as judge of the Superior Court, and was likewise receiver of the Merchants' National Bank, awarded to Mrs. Baker two hundred and fifty shares of the capital stock of the Seattle Water Front Realty Company—the decree disclosing that the settlement of the property relations between the plaintiff and defen-

dant were just and proper, and that the same were approved. It cannot be reasonably supposed that the court would have signed such a decree as this without knowing the details of the property settlement as the recitals in the decree are very full. Again, Judge Frater knew, and has known for all these years that A. S. Norton was the attorney for Mr. Baker as well as for himself, and any correspondence which Mr. Norton may have had with the Commissioner of Public Lands, or any deeds that may have been issued by the State to Norton, and by Norton to the Seattle Water Front Realty Company, especially upon these tide lands, should have prompted immediate inquiry. Again, it is shown that some years ago the Bank of Suffern in New York, made a loan upon Mr. Baker's stock in the Seattle Water Front Realty Company, and in ascertaining something as to its value corresponded with the Seattle National Bank, and it is a well known fact that one of the attorneys for the appellee is upon the board of directors and attorney for, and largely interested in this bank. Again, it is shown that in 1906 or 1907, the real estate firm of McGraw, Kittinger & Case, of Seattle, corresponded with Mr. Baker with reference to this block, and sought to get a price from him thereon.

We stop at this point and ask can it be seriously questioned that the appellee did not have years ago ample means of discovering any one of the half dozen clues which if followed up would have led to a disclosure of every item of information which he has now brought to the attention of the court? We need not go back to comment further upon the fact that the testimony of Reed, Turner and Rotch were just as much available to this appellee then as now.

We have discussed at some length the question of laches and what constitutes discovery. We desire to invite the Court's attention to the opinion of the trial court, as disclosing the fact that the basis upon which the decree in this case rests is that of a legal error that existed in this case from November 26, 1897. The position which the honorable trial court takes is—

(a) That the receiver had a right to buy these tide land contracts.

(b) That these tide land contracts were real estate.

(c) That real estate could not be sold without an order of the court.

(d) That an order of the court had not been obtained authorizing the sale of real estate.

(e) Hence, the sale to Simpson was void.

112 Fed. 507.

After reciting portions of the order obtained by Examiner Seeley on October 9, 1897, which the examiner, the receiver and the Comptroller of the Currency himself interpreted as embracing all property of the estate, the court holds that the receiver never had authority to sell this property. We are then face to face with the question that if the lower court be correct in this, the right to set aside the sale to Simpson has existed for seventeen years, and that right appeared upon the face of the record. Where one seeking redress has a complete remedy, he cannot lie idly by for seventeen years and then come in and say that he has discovered another remedy, and maintain his action upon this so-called discovery of an additional remedy. How can the appellee remain in this court upon the face of the findings of the lower court, that if the appellee had brought an action seventeen years ago he could have set aside all the proceedings of the receivership as it related to the transfer of this property to Simpson. The court holds that the sale from Baker to Simpson is void. If it was void then the rights of the estate have been complete for seventeen years and

the record of these proceedings was disclosed then as fairly as now. The receiver will be presumed to have known his legal rights, and the obligation would rest upon him to assert those legal rights promptly upon their discovery, and inasmuch as the discovery was a matter of his own negligence, because it existed in fact upon the records of the receivership, there can be no other conclusion than that the receiver had the open and unobstructed means of discovering seventeen years ago that this sale to Simpson was fraudulent. This position is unanswerable, for upon the theory announced by the court below that the sale was void for want of a proper order, the right was then complete to recover this property and not wait for seventeen years, nor wait until they might consider themselves in the position of having some other facts which were no better in their potential character in accomplishing the desired results than those which appeared upon the face of the record from the beginning.

The lower court disposed of the whole question of laches in the following language:

“It is next contended that the plaintiff is guilty of laches and should not be permitted to prosecute this action. I do not think that this suggestion has any force under the evidence of this case. Lapse of

time is no bar, and laches cannot be asserted until knowledge is brought home to the plaintiff, or such notorious condition or relation to the property in issue by the defendant, that the plaintiff should have known, and such condition is not disclosed by the evidence.”

212 Fed. 512.

Yet, in the preceding sentence the court holds that the receiver never had any authority to make the sale to Simpson, though the order has been on record for seventeen years, and if the receiver had exercised the right which the court here finds he possessed all these years, providing he had exercised this right timely, he would have been entitled to the same results as are accorded him by the decree of the court at this late date. We need not discuss the other facts as to the notorious condition of Baker's relations to this property as disclosed by the evidence.

DID THE RECEIVER BY REASON OF HIS REPURCHASE OF THIS PROPERTY FROM MR. SIMPSON, WHILE HE WAS YET RECEIVER, CHARGE IT WITH A TRUST FOR THE BENEFIT OF THE ESTATE?

Mr. Baker's receivership terminated in April, 1899. It is admitted that he repurchased tide land contract No. 728 covering block 430 in March pre-

ceding, so that possibly thirty days at most before his receivership closed he repurchased from Simpson a part of that which he had previously sold him. It was the contention of the appellee in the trial court that the receiver had no such right. It was the contention of the appellant Baker, in which we believe the law sustains him without doubt, that if the sale by Mr. Baker to Mr. Simpson was a *bona fide* one without any reservations whatsoever, Mr. Baker, having thus performed his full duty, would have a right to purchase this tide land contract at some future date. Mr. Baker testified that at the time the sale was made he had no reserve interest actually or in expectancy in these two tide land contracts and that he did not then have any expectation of ever acquiring any interest in these two contracts. (Tr. p. 262.) Unless Mr. Baker's testimony is absolutely disregarded there can be no question but what this was a fact. We do not think it is necessary upon the face of this record to argue this particular feature, but one side light is worth bringing to the attention of the Court at this juncture. Contracts No. 727 and No. 728, covering two blocks of tide land, were sold to Simpson in November, 1897. The appellee says that this was a fraudulent transaction; the appellants say it was not. The sale of

the two blocks was one and the same transaction; therefore if it was fraudulent as to one block, it was fraudulent as to the other. There must have been some subsequent arrangement even upon the appellee's theory of these facts, for his allegations of fraud comprehend both contracts, and he is seeking to recover only one. He, therefore, must admit that at some subsequent time there was some arrangement between Mr. Simpson and Mr. Baker different from that which was originally entered into. The appellant Baker says that the original arrangement was a *bona fide* one, by which Mr. Baker sold to Mr. Simpson both these contracts, and that about a year and a half after that sale he bought back one of them. The appellee says that the original sale was a fraudulent one, but he offers no testimony or explanation as to when, or how, or the reason why, one of the blocks is dropped out of his calculations, and he is seeking to recover only a portion of that which he says was originally fraudulently conveyed.

But we return to the question of Mr. Baker's repurchase of this property in March, 1899, preceding the close of his receivership in April. We again assert that the testimony is clear and convincing that the sale to Simpson a year and a half previous-

ly was *bona fide*, for a valuable consideration, indeed full value, and without any reservations whatsoever, or any expectancy on the part of the receiver of ever becoming interested in this property. Fortunately, we have a decision by the Supreme Court of the United States bearing directly upon this question. In the case of *Robertson vs. Chapman*, 152 U. S. 673; 38 L. Ed. 592, we find this state of facts. A firm of lawyers, Chapman & Polk, of Nebraska, acting on behalf of a client residing in Maryland—the client being the trustee of an estate—sold for their client certain lots of land to one O'Donohoe. Before the payments upon the sale were actually made the lawyers purchased the property from O'Donohoe. The question presented in this case was whether while acting as the agents of their client in Maryland they could become the purchasers of the property which they had sold. The court lays down the general principles which are now well established, that an agent cannot take advantage of his principal, and cannot directly or indirectly become the purchaser and maintain any title thus acquired as against his principal, for by so doing his duty and his interest would come in conflict. Mr. Justice Harlan, writing the opinion of the court, says, p. 596:

“If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, * * * While his agency continues he must act, *in the matter of such agency*, solely with reference to the interests of his principal.* * *”

It will be remembered that O'Donohoe had agreed to buy, but had not yet made the first payment, having executed the notes that were a part of the consideration of the purchase price, and while the deed was coming from Maryland the sale was made from O'Donohoe to Chapman and Polk, and they paid the money that was ultimately turned over to their client. The court further says, p. 596:

“The sale to O'Donohoe was so far consummated that neither party was at liberty to undo what had been done. O'Donohoe executed his notes for the deferred payments, and, his wife uniting with him, gave a mortgage to secure them. The notes and mortgage were delivered to and accepted by the plaintiff, who executed a deed to O'Donohoe, and placed it in the hands of Polk, to be delivered to O'Donohoe, whenever a decree for the sale of the property was obtained, and upon the payment of the \$1,000 stipulated to be paid in cash. So that at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. *Nothing*

then stood in the way either of O'Donohoe agreeing that Polk should take the property, or of Polk becoming a purchaser from him. If the sale to O'Donohoe was an actual sale, in good faith, so far as Polk had any agency in effecting it—if the contract between the plaintiff and O'Donohoe had been so far executed at the time Polk took O'Donohoe's place in the purchase, that it could not be rescinded by either party to it—then Polk's agency in selling the property did not prevent him from purchasing from O'Donohoe. * * * A real *bona fide* sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee."

This is an exact parallel with the case now before this court. A *bona fide* sale took place by Mr. Baker to Mr. Simpson, and this intervened between his agency as receiver, by the authority of which he made the sale, thus closing his work "in the matter of such agency," and his subsequent purchase of the property. This case of *Robertson vs. Chapman* is not sustained by as strong facts as are presented in the case at bar.

We invite the court's attention to the case of *Board of Trustees of Oberlin College vs. Blair*, 32 S. E. 203 (W. Va.), which lays down the principle that when an agent has fully discharged his trust in good faith and had no interest in the sale at the time

it was made, he may afterwards acquire the title from the purchaser, his rights being the same at that time as those of any other person with respect to the property so sold.

See also upon this point:

Keet & Rountree Co. vs. Gideon, 80 Mo. App. 609.

Miller vs. Lebanon Lodge, 88 Ind. 286.

We have not been able to find a decision that runs contrary to the rule of law as laid down in the foregoing cases, which is reasonable and common sense,—that if an agent has fully discharged his duties as to the particular subject matter of that agency, thereafter he may repurchase the property.

It will be kept in mind that Mr. Baker's agency was limited to his selling this property, not to the buying of property, and when the property was sold he had fully discharged every requirement of his agency, and when he repurchased the property he was performing an act without the realm of his agency.

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

The broad proposition that this action is not

maintainable under the laws of the United States, and that therefore the complaint does not state a cause of action, is based upon the following considerations:

First. The Merchants National Bank and the Receiver in winding up its affairs never acquired any title, either legal or equitable, to the tideland block 430 which the complainant seeks to recover. The present Receiver should not be decreed a trustee on account of any alleged misconduct of the former Receiver, Baker, in transferring the title to himself through Simpson as an intermediary.

Second. The entire consideration paid to the State of Washington for the title to the property involved has been paid by Simpson and his assigns. No part of the consideration was ultimately paid out of the funds of the insolvent Bank. The title is therefore not impressed with a trust in the nature of a resulting trust.

Third. The Bank and its Receiver were at all times wholly without power to purchase this property, and any attempted purchase was contrary to law and *ultra vires*. The Receiver Baker therefore did not at any time take title to himself for his own use and benefit in violation of any duty to the Bank or the trust which he was administering. The

complaint does not allege any transaction by means of which Baker reaped a profit for himself which under the law he had a right or duty to engage in for the use and benefit of the Bank and the insolvent trust which he was administering. The property is therefore not subject to a constructive trust.

Fourth. A court of equity will not at any time give aid and assistance to effect a result which the party who seeks the aid of the court would not be permitted to effectuate by voluntary agreement between the interested parties.

The same general premises of law and fact applies to each of these legal propositions and will therefore be stated before we discuss separately the decisions applicable. Tideland Block 430 originally constituted a part of the first-class tidelands within the City of Seattle lying between high tide and the inner harbor line established by the State Harbor Line Commission. The harbor line lease referred to in the complaint is the area lying between the outer and inner harbor lines reserved by the State of Washington for the purpose of navigation and commerce but subject to lease for commercial purposes under the state statutes.

“The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide.” (*Constitution*, Art. 17, Sec. 1.)

“The tidelands of the State of Washington belong to the state, which has full power to dispose of them, subject only to the restrictions imposed by the Constitutions of the State and of the United States, and no individual can claim any easement in or impose any servitude upon the tide waters of the state without the consent of the legislature.” *Eisenbach vs. Hatfield*, 2 Wash. 236.

The legislature of 1890 provided for the survey, appraisement and sale of the tidelands. By the terms of the act the abutting upland owner was given the option for sixty days after the appraisement to buy at the appraised value, after which time if the upland owner did not avail himself of this privilege any person might require the tideland to be sold at public auction. (Laws of 1890, p. 435.)

This option gave to the upland owner no vested interest. The right to purchase at the appraisement was a mere privilege subject to withdrawal at any time by the State and subject to change of the State's policy in the disposition of its public lands. The privilege to purchase given by the State prior to its acceptance is not a property right and was subject to be withdrawn or impaired without compensation. (*Allen vs. Forrest*, 8 Wash. 700.)

In 1893 the Legislature authorized the Commissioner of Public Lands to make a contract for the improvement of the State's tidelands by dredging canals and waterways to facilitate commerce and for the disposition of the dredged material upon the adjacent tidelands, thereby reclaiming the submerged and partly submerged land for useful purposes with the material excavated from the highways for vessels. The act gave to the contractor performing this service a lien upon the reclaimed lands in the amount provided for in the contract. (Laws of 1893, p. 241.)

Under this act the lien took effect upon the date of the contract and became enforceable as soon as the work is completed upon that portion of the lands and when the amount of the filling was ascertained. A subsequent purchaser cannot question the validity of the lien as he is held to have purchased subject to its terms. (*Schlopp vs. Forrest*, 11 Wash. 640.)

On October 27, 1894, Eugene Semple entered into a contract with the State through its Land Commissioner for the filling in of certain tidelands, including the lands involved in this litigation. Subsequently, W. D. Hofius, one of the purchasers of adjacent tidelands referred to in the evidence in this

case, brought an action to contest the validity of the Semple contract and the lien provided for in the contract under the law hereinbefore referred to. The decision by the Supreme Court reaffirms the rule of property previously announced, that an abutting upland owner has no vested right or interest in the tidelands, and that the privilege given to him for a limited time to buy at the State's appraisement was a mere preference which he enjoyed over the public in general, but that preference before its acceptance did not impose in any way any encumbrance or other burden upon the land in his favor. The lien which attached to Block 430 upon the making of the Semple contract in 1894 has since its consummation been ascertained to amount to approximately eighty thousand dollars.

Early in the year 1895 the State Land Commissioner filed a plat of the Seattle tidelands, dividing the same into lots and blocks, with an appraisement in accordance with the existing law. Within sixty days after the filing of the plat and the appraisement, on April 5, 1895, A. Macintosh, as president of the Merchants National Bank of Seattle, filed with the State Land Commissioner the application of the Bank to purchase several blocks, including No. 430. In his application Macintosh stated that

the Bank was the owner of the abutting uplands. Afterwards, on June 19, 1895, the Bank having become insolvent, Baker was appointed receiver. On January 12, 1897, the State in the meantime having approved the application of Macintosh in behalf of the Bank, a contract was executed between the State and the Bank by Baker as receiver, wherein the State agreed to sell and Baker agreed to purchase Block 430. Similar contracts were made affecting other lands applied for by Macintosh. In that contract it is provided:

“And the party of the second part hereby covenants and agrees to purchase of the party of the first part the above described land and to pay therefor the sum of fourteen hundred eighty-eight dollars (\$1,488.00),” etc. (Trans. p. 105.)

One-tenth was paid by Baker upon the execution of the contract, the balance to be paid in nine annually maturing installments.

This contract was made by Baker previous to any application by him for authority to the Comptroller of the Currency and without the approval of the Secretary of the Treasury.

On January 26, 1897, Receiver Baker wrote to the Comptroller a letter requesting a ratification of his action in making this contract, in which he stated:

“This right to purchase is a valuable asset of the trust and accordingly I respectfully ask you to ratify the following contracts between the State and myself as Receiver” (among others) “all of Block 430, appraised value \$1,488.00.” P. 98.)

To which letter the Comptroller, through his deputy, answered:

“* * * Inasmuch as the contracts are assignable they can no doubt be disposed of to advantage at any time should such course seem advisable.” (P. 99.)

We have before us in these facts a case of land speculation, pure and simple. The conclusion from these facts appearing upon the face of the bill, in connection with the law of which the court will take judicial notice, that the transaction was a speculation is emphasized by the evidence given by the witnesses on the subject of the value of the property, all of whom say that there was no market and that its value was purely speculative.

This brings us to the authority of the Bank and the Receiver to engage in the transaction.

“POWER TO HOLD REAL PROPERTY. A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its im-

mediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years." *III U. S. Compiled St., Sec. 5137; 13 Stat. at Large, 107.*

Receivers of national banks are purely statutory creatures with statutory powers and no other powers. The following sections of the U. S. statutes are applicable:

"That whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the

facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

“Sec. 2. That such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States.”
III U. S. Compiled Stat., pp. 3514-15, Secs. 1 and 2; *24 Stat. at Large*, 8.

It will be noted that Block 430 was owned by the State of Washington and was not subject to “any bond, mortgage, assignment or other proper legal claim attaching thereto” and was not about or subject “to be sold under any execution, decree of foreclosure or proper order of any court of jurisdiction.”

This law was enacted to protect junior liens held by a bank against being wiped out in proceedings against real estate for the satisfaction of underlying obligations and clearly have no other purpose.

Aside from the fact that no law existed enabling the Receiver to make the purchase, he did not comply with the statute requiring him to submit a request for the right and authority to use and employ the money of his trust to make the purchase.

The Congress was not satisfied to commit the diversion of trust funds of an insolvent bank to the discretion of the Comptroller upon the advice of the Receiver or otherwise, but provided the additional safeguard set forth in Section 2 that no such diversion should be made without the concurrence and approval of the Secretary of the Treasury, and required that such approval shall be endorsed in writing and filed with the Treasurer of the United States.

We will now take up the legal propositions in the order stated under this title of the brief.

The contract made between the Bank through Baker as Receiver and the State for the purchase of Block 430 was absolutely void so far as it affects the Bank and the insolvent estate which Baker was administering.

The Supreme Court of the United States, to which we must look for authority, has drawn a clear distinction, in the application of the doctrine of

ultra vires, between that class of cases which grow out of loans made incidentally upon mortgage securities and that class of cases which grow out of purchases of property not authorized by a law.

National Bank vs. Matthews, 98 U. S. 621, is the authority relating to mortgage loans and the right of the mortgagor to question that authority to which all the later cases on the subject refer. The syllabus accurately states the point involved:

“A executed a promissory note to B, and, to secure the payment thereof, a deed of trust of lands, which was in effect a mortgage with a power of sale thereto annexed. A national bank, on the security of the note and deed, loaned money to B, who thereupon assigned them to the bank. The note not having been paid at its maturity, the trustee was, pursuant to the power, proceeding to sell the lands, when A filed his bill to enjoin the sale, upon the ground that, by Sections 5136 and 5137 of the Revised Statutes, the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. *Held*, that the bank is entitled to enforce the collection of the note by a sale of the lands.”

The opinion of Mr. Justice Swayne considers the case in two aspects. First, the transaction was not within the law of the United States prohibiting real estate loans. If the court had been content to stop here, it would have saved itself from the ne-

cessity of afterwards straightening out the confusion which the latter part of the decision created, but the court went further and viewed the case from a second aspect as a loan upon real estate security and, so treating it, came to the conclusion that the statute did not declare such security void but was silent on the subject; that had Congress so intended, it would have been easy to say so and it can hardly be presumed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. After citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties but only to authorize actions by the government, the Court held that the prohibitory clause of the banking law did not vitiate real estate securities taken for loans, and that a disregard of them only left the association open to proceedings by the Government. Mr. Justice Miller in dissenting said:

“I am of the opinion that the Banking Act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands.”

In the subsequent case of *National Bank vs. Whitney*, 103 U. S. 99, involving the right of a

national bank to take real estate security in payment of a debt not previously contracted, the court held that the prohibition of a statute against real estate loans is not available by the mortgagor as a defense. Mr. Justice Field in the course of the opinion emphasized the ground on which the opinion is based:

“The question presented is not an open one in this court. It was determined in the case of *National Bank vs. Matthews*, at the October term of 1878” (p. 101). * * *

The construction of the act of Congress thus given has been acted upon by national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends in a great degree upon the stability of the rules by which these transactions are governed” (p. 102).

The ground of prior adjudication, upon which

the majority of the court appear to have based their decision, did not satisfy Mr. Justice Miller and Mr. Justice Harlan.

In the case of *Fortier vs. New Orleans Bank*, 113 U. S. 439, it is held that a mortgage given to a bank upon real estate to secure a loan is not void is held to be a question foreclosed by the *Matthews* and *Whitney* cases.

It is significant that in the *Whitney* case the court, after pointing out its practical inability to change the principle insofar as it affects commercial paper, stated in the second aspect of the *Matthews* decision, suggests legislation which will affect only future transactions.

In frequent decisions since *National Bank vs. Whitney*, the *Matthews* and *Whitney* cases are cited and distinguished limiting the scope of the principle to mortgage security taken by a bank, generally on the ground that such security is merely incidental to the personal credit based on the note or bond. What Mr. Justice Field refers to as the "second aspect of the *Matthews* case" was squarely presented to the Supreme Court as applied to transactions other than mortgage security in

McCormick vs. Market Bank, 165 U. S. 538.

Here we find it squarely decided that the principle of law announced in the *Matthews* and *Whitney* cases does *not* apply to a lease of real estate made in violation of the statute.

Section 3136, R. S., provides that until the association has been authorized by the Comptroller to commence the business of banking the corporation is forbidden to transact any business except such as is incidental and necessary to its organization.

After the incorporators had made and filed the certificate of organization but before the Comptroller had issued his certificate of approval, the lease in question was made for a room in which to transact the business of banking for a term of years with the right to cancel on ninety days' notice on May 1st any year. Suit was brought by the lessor for unpaid rent under the terms of the lease from the time the corporation surrendered possession until the following May 1st. The bank set up the provision of the statute prohibiting it from doing business when the lease was made in support of its plea of *ultra vires*. The plea of *ultra vires* was sustained and judgment for the defendant in the state court was affirmed. In the opinion by Mr. Justice Gray it is said:

“It is settled by a long series of decisions of this court that a lease of a railroad by one railroad corporation to another which is beyond the corporate powers of *either*, is unlawful and void and can not be made good by ratification or estoppel, so as to sustain an action upon the lease; that this is so not only when the lease is *ultra vires* of the *lessor* corporation and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration it received its charter from the State; but even if the lease is *ultra vires* of the *lessee* corporation only and therefore not open to that particular objection.” (Numerous citations.) (P. 550.)

“The lease sued on having been executed by the defendant contrary to express prohibition of the statute which peremptorily forbade the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever except in perfecting its organization, the lease is void and cannot be made good by estoppel and cannot support an action to recover anything beyond the *value* of what the defendant has received and enjoyed.” (P. 553.)

This case applied to the case at bar is compelling authority in support of our proposition that the contract of purchase from the State was absolutely void because (a) the Bank was forbidden to purchase the land, (b) the Receiver by implication could not have power to do anything greater than the Bank; (c) the statute does not give the Receiver the power to buy land requiring the expenditure of trust funds except to protect junior liens about to be

lost through sale of the property under superior liens; (d) and in no case without the prior express written authorization by the Comptroller, approved by the Secretary of the Treasury.

The document purporting to be a contract of purchase made with the State was void both because its subject matter is not within the statute authorizing the receiver of a national bank to purchase land under special conditions but was void for want of authority to make any contract just as the Market Bank was without power to make any contract until the Comptroller had approved the certificate of organization. In the case at bar, the joint authority of the Comptroller and Secretary of the Treasury was required. The authority required by the statute was never given either in the Market Bank case or the case at bar.

McCormick vs. Market Bank was decided March 1st, 1897. It appears from the opinion that the *Matthews* case (and only the so-called "second aspect" was applicable) was relied on to meet the defense of *ultra vires* pleaded by the defendant bank.

Nine days later, on March 10th, the doctrine of the *Matthews* case was again relied upon in argu-

ment in support of the proposition that under the national banking act the plea of *ultra vires* would not avail to relieve either party to a transaction forbidden by law. Counsel apparently did not comprehend, even with Mr. Justice Gray's clear language before them, the anomaly that a *void paper*, void among other reasons because it is against public policy, can have some vital force between the parties and that the Government's only remedy to enforce its laws is to punish the offender, leaving him in full enjoyment of the fruits of his offense.

This doctrine, repeated by counsel on the argument and supported by the Supreme Court of California, apparently impressed the Supreme Court of the United States with the importance of settling in unmistakable language the effect upon a written agreement of a statute prohibiting the acts constituting its subject matter.

“An act or transaction expressly prohibited by statute is void ab initio.”

California Bank vs. Kennedy, 167 U. S. 362.
(Argued March 10, 1897.)

The present Chief Justice, speaking for the court, lays down the following principles, fortified by the citation of abundant authority:

“It is settled that the United States statutes

relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established."

"So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

An *ultra vires* act cannot be given vitality. The nullity of an *ultra vires* act may always be asserted.

"A contract of a corporation which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

(Quoted from *Central Transp. Co. vs. Pullman's Palace Car Co.*, 139 U. S. 24.)

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often

recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interests of stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that a corporation shall not transcend the powers conferred upon it by law.

“The doctrine thus enunciated is likewise that which obtains in England.”

(Then follows the citation of numerous English cases.)

“The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stock is consequently an *ultra vires* act. Being such, it is without efficacy.”

“If it could have been shown that it was an act absolutely prohibited by their memorandum of articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification.” (Quoted from Chief Justice Selwyn.)

“I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares.”

“No other person or body of persons could be *prejudiced* or *benefited* or *affected* by an instrument

to which they were absolute strangers, such instrument being void as between the parties to it."

"The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank was one entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. (*National Bank vs. Whitney*, 103 U. S. 99; *National Bank vs. Matthews*, 98 U. S. 621.) The difference between those cases and one like this was referred to in *McCormick vs. Market National Bank of Chicago*, *supra*, and it is, therefore, unnecessary to particularly review them.

"It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified."

The purchase of real estate by a national bank is expressly prohibited subject to certain exceptions not applicable to the case. There can be no difference in the application of the legal principle applied to corporation stock.

The principle is approved and amplified in *Concord First National Bank vs. Hawkins*, 174 U. S. 364.

The court had occasion to apply the principle of the *Kennedy* case in *First National Bank vs.*

Converse, 200 U. S. 425, the facts of which are quite analogous to the case at bar. The plaintiff bank was one of the creditors of a manufacturing corporation in the State of Minnesota, which failed. The creditors, including the bank, organized a new company for the manufacture of the same articles, exchanging their claims against the failed company for stock in the new. Afterwards the new company failed, and, under a Minnesota statute imposing double liability upon stockholders, suit was brought against the bank to enforce the statutory liability. The bank defended upon the ground, among others, that the whole transaction so far as it affected the bank was *ultra vires*. To avoid the effect of prior decisions of the Supreme Court, it was urged against this defense that the bank in participating in the reorganization of the old company and exchanging its claims arising out of debts contracted by the old company for stock of the new company, was protecting property legally acquired in the first instance in the collection of a debt. Upon this point the court, speaking through the present Chief Justice, said:

“The power of a national bank to engage in the character of business which the articles of association of the thrasher company manifested, as defined

by the Supreme Court of Minnesota, cannot be inferred to have been possessed by the bank as an incident of securing a present loan of money or as a means of protecting itself from loss upon a pre-existing indebtedness. To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a preexisting debt, does not imply that because a national bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held cannot be done. (P. 439.)

“The speculative venture, therefore, which the bank undertook, as held by the Minnesota court, when it engaged in taking the stock in the thrasher company being *ultra vires*, it follows, under the settled rules hitherto applied by this court, that the bank, despite the subscription, was entitled to plead its want of authority as a defense to the claim of the receiver. The doctrine on the subject was stated in *De la Vergne vs. German Savings Inst.*, 175 U. S. 40, where it was said:

“The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they do not undertake; that if the contract be prohibited by statute everyone dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized.” (P. 440.)

We will conclude this branch of the argument

by referring to *Merchants National Bank vs. Wehrman*, 202 U. S. 295.

A partnership was formed to purchase, improve and divide into lots and sell a leasehold. There were forty shares in the firm represented by transferable certificates. The bank took nine of these shares as security for a debt and afterwards became the owner in satisfaction of the debt. It was claimed that the partners must contribute to pay the debts of the firm, and some of them being insolvent, the bank was charged with the full share of a solvent partner. The Supreme Court of the State held that the bank could not be thus held but decided that the bank became a part owner of the property and afterwards joined in the management of the same, and was liable for nine-fortieths of the expenses which constituted the debts of the firm. A writ of error was prosecuted from the Supreme Court of the United States to reverse this judgment. The Court held that the taking over of a certificate of partnership in payment of a pre-existing debt was an *ultra vires* act, because if it were held good it would subject the bank to a liability and under the law a national bank cannot incur such liability. Mr. Justice Holmes concludes the opinion on this point by saying:

“It recently has been decided that a national bank cannot take stock in a new speculative corporation with the common double liability, in satisfaction of a debt.” (*First National Bank vs. Converse*, 200 U. S. 425.) “*A fortiori*, it cannot take shares in a partnership to the same end.” (P. 301.)

A national bank is not authorized by law to purchase its own shares.

Burrows vs. Niblack, 84 Federal, 111.

This was an action in assumpsit, brought by the receiver of a national bank to recover the sum of Ten Thousand Dollars paid by the bank before insolvency to one of its stockholders as consideration for the purchase of its stock. The stock was delivered to the bank and held by the receiver among the effects when the suit was brought. The Circuit Court of Appeals affirmed the judgment in favor of the receiver on the ground that no title to the stock ever passed to the bank because the bank had no power to make the purchase. The whole transaction of sale and purchase was held absolutely void.

Under these authorities which express vital law applicable to the case at bar, the contract made between the insolvent Merchants National Bank, by Baker, its receiver, and the State of Washington, for the purchase of this Block 430, was so far as it affected in any way the bank, either as an asset or

liability, absolutely void. The fact that the State afterwards recognized this contract as a basis for making a deed to Norton, upon payment of the full consideration to the State, by Simpson and his assignee, has nothing to do with the case. The State could dispose of its tide lands to any person who saw fit to buy them. It was within the power of the State to sell this land without a contract, upon payment of the full amount of the appraisement. Having received the full consideration it made the deed to the parties and the assigns of the parties who paid the price. Baker had no more right, after this paper purporting to be a contract between the Bank and the state, had been signed, to perform any of its executory obligations than he had to enter into the contract in the first instance. If, therefore, it be true as alleged in the bill, that he individually paid to the State the subsequent accruing installments, either directly or through the instrumentality of Simpson, he cannot be held to have violated a duty which he owed to the trust which he was administering. The highest measure of his duty to the trust was to do for its benefit everything which the law permitted him to do. It was not any part of his duty to continue to violate the law by misappropriating the trust funds

in his hands and continuing to do that which the law and public policy forbids.

The land is not impressed with a resulting trust.

A resulting trust arises out of the ancient equitable principle that the beneficial estate follows the consideration and attaches to the party from whom the consideration comes. (*Pomeroy's Equity Jurisprudence*, 2 Sec. 1037.) This doctrine is carried to the extent of awarding allequot parts of real estate to the persons who contributed to the consideration in proportion to the amount severally contributed by each. (*Pomeroy's Equity Jurisprudence*, 2, Sec. 1038.)

While Baker as receiver paid two of the ten annual installments to the State, out of the funds of the trust, the fact that the money was misappropriated and he was liable on his bond to restore it, which he afterwards did, makes either Baker individually or Simpson the real contributor to the consideration. Equity looks through the form and goes to the substance. That the following eight payments were made by Baker and Simpson out of their own funds, without any confusion with the funds of the trust, appears from the allegations

of the bill. The first two of the ten payments made by Baker while he was receiver cannot impress the title with a resulting trust, even *pro tanto*, because the payment was made with misappropriated money, for which he as receiver was liable, and because he was positively prohibited by law from making the investment, and as we shall discuss hereafter, a court of equity will not abuse its processes to accomplish an illegal purpose.

The property is not impressed with a constructive trust.

Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner. (*Pomeroy's Equity*, Sec. 1044.)

The bill in this case apparently charges defendant Baker with an unlawful acquisition of trust property while acting in a fiduciary relation. A constructive trust of this character rests upon the broad doctrine that a fiduciary person must give to his principal the product of everything he accomplishes in the performance of what he does with relation to his principal's property. He is not permitted to appropriate to his own benefit anything to which the principal is entitled, either by

way of original property which comes into his hands, or profits which arise out of that property, or through his labor as trustee. A familiar statement of the rule is that the principal is entitled to all the profits and the trustee to none (aside, of course, from express agreement). We are willing to put this rule in the very strongest language expressive of the highest obligation possible to conceive.

But how does it apply in the case at bar? Here was a piece of property which neither the bank while a going concern, or the insolvent trust, had any right to acquire. Here was a piece of property which the supreme law of the land, in letters of light capable of being read by day and by night, said, "Thou shalt not touch." What duty did Receiver Baker owe to that property? He may have innocently supposed, and did undoubtedly suppose, that he owed the duty to his trust of making some money out of it, but in that conception of his duty he was mistaken and a right can never be founded upon a wrongful act performed through a misconception of duty. A title cannot be acquired through a violation of law which could not be acquired by obedience to law. To say that it was the duty of a

man in the performance of his public office to violate the law of the land appears to be an anomaly.

Equity courts will not aid in the consummation of transactions prohibited by law.

While authority might be multiplied in support of this proposition, we will not weary the court with profligacy of citations, but confine ourselves to a single case from the court of last resort upon questions of this character.

Case vs. Kelly, 133 U. S. 21.

Defendant Kelly and other trustees of the Green Bay Railroad Company solicited for that company donations of land ostensibly for the benefit of the road, but took the titles to themselves individually. They did this in a fraudulent manner by making the grantors in the conveyances believe that they, as officers of the company, could receive the conveyances for the benefit of the road. That the grantors did not really know to whom the paper conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. The defendants did not recognize this trust. The suit was brought to have a declaration of trust made by the court and a decree ordering conveyances by the defendants

of the land to the corporation. It was found that certain of the lands conveyed to the trustees in their individual names were intended for use by the corporation as operating property, such as depot grounds and rights of way, but that other lands were not useful for that purpose and were not lands which the corporation under the law had a right to acquire.

Defendants plead, among other things, the incapacity of the corporation to acquire by purchase or otherwise the lands not intended for use as operating property. In reply to this the receiver of the Railroad Company, who brought the suit, contended that the right and power of a corporation to receive land is one which concerns the State alone and the right of the corporation to the lands in question can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. On this point Mr. Justice Miller says:

“The case of *National Bank vs. Matthews*, 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action and is seeking to obtain the title to such lands. It has no

authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

The compelling authority running from *McCormick vs. Market Bank* and *California Bank vs. Kennedy* is followed and emphasized in every decision since and the application of the equity rule by the court, in *Case vs. Kelly*, which has not in any way been criticized since the date of its rendition, would, in our opinion, have justified resting this case wholly upon the allegations of the bill of complaint. The fact that we chose to place before this court independent grounds of defense is no suggestion of doubtful faith in the position that, granting the most extravagant allegations contained in the bill and applying them to the law of the case, complainant's suit is without merit.

HARBOR AREA LEASE No. 181.

Assignment of errors, paragraph XI is as follows:

“Because the District Court erred in ordering the appellant Seattle Water Front Realty Company to hold said harbor area lease for the use and benefit of the appellee and to convey legal title to the appellee.”

The Legislature in 1895, Session Laws of 1895, p. 563, provided for the leasing of the area between the outer and inner harbor line, and gave to the owner of abutting tide land the preference right for a limited period of time to make such lease for the uses of trade and commerce, and provided an annual rental to be paid to the State. The lease made by the State to Simpson required the continuing payment during the thirty-year period of the lease of an annual rental, and obligated the lessor to hold the property for the public uses. Neither the Bank or its Receiver could obligate the trust for the payment of this rental, and neither the Bank or its Receiver could engage in the business for which the lease was made. The lease by its terms clearly falls within the acts prohibited by the federal statute, and is void under the holding of the Supreme Court in *National Bank vs. Converse*, 200 U.

S. 425, and in *Merchants' National Bank vs. Wehrmann*, 202 U. S. 295, heretofore cited.

Aside from the legal inability of the Receiver to make this lease, there is no suggestion that the lease was entered into by Receiver Baker or by the Bank. It is admitted that the lease was made between Mr. Simpson and the State. The lease was purchased by Baker long after his connection with the receivership had ceased, and for a valuable consideration wholly independent of the amount that Mr. Simpson had paid the state. (Tr. pp. 163, 278.)

SUMMARY OF THE FACTS.

The bill of complaint alleges no consideration from Simpson to Baker. The evidence, books of account and the reports to the Receiver prove the contrary, and that the Receiver received, passed into his books and into the treasury of the United States, through the Comptroller's office, the full amount of money which he presumed he had paid out and \$50 additional upon each of these contracts.

The bill also alleges that Mr. Baker procured the issuance of harbor area lease No. 181 in the name of Mr. Simpson, and alleges that this was a part of the scheme to defraud. The exact contrary to this is proven. In 1904, five years after

Mr. Baker's purchase of block 430 from Simpson, he wrote to the Commissioner of Public Lands at Olympia to ascertain the status of the harbor area in front of block 430 (Tr. p. 278). Mr. Reed is unqualified in his testimony that the sale of the harbor area lease No. 181 was wholly disconnected with the purchase by Mr. Baker of block 430; that Mr. Simpson owned this harbor area lease, and that he required Mr. Baker to purchase it before he, Mr. Reed, would turn over to him the tide land contract on block 430 (Tr. p. 163). Here, again, the testimony flatly contradicts the allegations of the bill.

The bill further alleges that Mr. Baker from time to time advanced to and reimbursed Mr. Simpson for the sums that he was required to pay the State. The evidence is undisputed that this is not true. When Mr. Baker bought from Simpson in March, 1899, he paid Simpson the amount that he was then out, plus interest, which aggregated about \$400. No other payment was ever made by Baker to Simpson until 1905, when the advances and the purchase price of the harbor area lease were paid to him. Here, again, the evidence is contrary to the allegations of the bill.

Again the bill alleges that the assignment was made by Baker to Simpson without actual consider-

ation, and without the knowledge or consent of the Comptroller of the Currency. The evidence, however, is clear and convincing that the sale was reported to the Comptroller of the Currency in the next quarterly report, and the name of the purchaser was given (Tr. p. 200). That the Comptroller subsequently sent Special Examiner Wing to Seattle in June, 1898, who investigated in person the particulars surrounding this sale and interviewed Mr. Simpson and Mr. Anderson, as well as business men and bankers of Seattle, after which he went with Mr. Hill, the receiver's bookkeeper, and viewed the property. In addition to all this we have the positive evidence of Mr. Baker that there never was any secret arrangement, but that the sale was a bona fide one, and was made only after six months of effort, in which he circularized the creditors, stockholders and real estate men of Seattle, and the best offer he could get was \$1.00 for each of these contracts. It would seem also upon this point that the evidence was directly opposed to the allegations of the bill.

The bill further alleges that the facts "were wholly unknown to any of the creditors and stockholders of said Bank and to plaintiff and the Comptroller of the Currency until the year 1913."

There is not a scintilla of evidence to sustain any portion of this allegation. The appellee has wholly failed to prove any of the essential things that are necessary in order to avoid the doctrine of laches.

The bill further alleges that the facts as alleged therein were concealed until February, 1913, and that the Comptroller of the Currency first discovered them at that time. The appellee offered no testimony upon this point whatsoever. There is no showing that the Comptroller may not have known all these facts for all these years, or that the present receiver himself may not have known them for many years.

The appellee has failed to establish the material allegations of his complaint.

We believe that the testimony of the appellant Baker deserves the greatest consideration at the hands of this court. All the skill and energy which counsel for appellee were able to command they threw into their cross-examination of Mr. Baker, and he sat and unflinchingly and unswervingly told the facts, step by step as they occurred, and every incident, whether the complexion of that transaction was favorable or not, was related by him in a frank and straightforward manner. He admitted his intimate relationship with Mr. Simpson and

Mr. Anderson, and says it was because of this relationship and because of their being identified in the same electric power enterprise that Mr. Simpson was willing out of his generous disposition and large wealth to carry, after the sale by Simpson to him, this block until he could get his judgments paid up and reimburse Mr. Simpson the outlay. He related the condition of the real estate market, and that there was no sale for tide lands, and that all this property was of a speculative character. We do not hesitate to say that if Mr. Baker and Mr. Simpson had been guilty of the felonious conduct with which they are charged, counsel for appellee would have found on cross-examination some item of evidence to aid him in his theories, or he would have been able to have produced some witness who would have given some scrap of testimony that would have at least lent color to the theory of fraud which has been advanced so strenuously by the appellee. The record discloses the fact that the cross-examination of Mr. Baker was conducted practically without objection.

We respectfully submit that the appellee has

wholly failed in establishing his right to maintain this action, or the showing to the court of facts warranting the decree entered herein, and that the lower court should be reversed and this cause dismissed.

Respectfully submitted,

B. S. GROSSCUP,

W. C. MORROW,

CORWIN S. SHANK,

HORATIO C. BELT,

Solicitors for Appellants.

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No. 2438

United States Circuit Court of Appeals

NINTH CIRCUIT

CHARLES H. BAKER, ALGER-
NON S. NORTON, and SEAT-
TLE WATER FRONT REA-
LTY COMPANY, a corpora-
tion,

Appellants,

vs.

JOHN W. SCHOFIELD, as Re-
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ATTLE,

Appellee.

BRIEF OF APPELLEE

FREDERICK BAUSMAN,
DANIEL KELLEHER,
R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellee.

1408 Hoge Building,
Seattle, Wash.

Press of Pliny L. Allen, Seattle, Washington

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DANIEL KELLEHER,
R. P. OLDHAM,
R. C. GOODALE,

Attorneys for Appellee.

1408 Hoge Building,
Seattle, Wash.

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STATEMENT.

BAKER'S CONDUCT GENERALLY. Baker, covered with judgments and liabilities (254), was appointed receiver in 1895 by Comptroller Eckles, a friend of Baker's rich father in Chicago, (298), this in spite of the protests of creditors (298), for Baker owed this very bank \$10,000.00 on direct loan (299). Having the indelicacy to accept this trust, he was not slow in claiming an offset on his note, and the friendly Eckles endured this until 1897, when he suggested a submitting of these questions to a court (Addenda 2, *infra*). Baker admits that he never sought an adjudication. (302-3). Instead, he clung to the receivership a year and a half longer, when a new comptroller, Dawes, became emphatic about the liability. (302). Then Baker in a clever letter resigned. (Addenda 3). This in April '99. As for the note, it was sold as worthless in 1899 by the succeeding receiver, Frater, because of Baker's insolvency (168). But Baker was at that very time secretly acquiring, as he now admits, this very land, equal in value, in '99, to the note. His own father bought the note through a lawyer, one Hardin, as a worthless asset (305).

The very day after mailing his resignation he hurriedly recommended and accomplished a sale of the bank's *remaining* tide lands to an intimate friend, concealing that friend's name in the trans-

action, however, and making him a handsome profit. This friend, Anderson, he had formerly been charged with assisting to another large profit, hence his concealing his name from the Department. As to this queer transaction, see our Addendum 4.

The foregoing is not our story. It is Baker's, his own. His diligently secret conduct after resigning, and his attempt to deceive this court in his answer, will be detailed later.

Baker, though wealthy, or "well fixed" (311), apparently never troubled himself afterwards about the note. As for the depositors, they have received dividends of only 52% in all (172).

CHANGES IN BAKER'S ANSWER.

Baker's answer was not originally in its present form. On the contrary, it contained positive falsehoods, corrected, only after exposure, by interlineation at the opening of trial (96-7). Several months before the trial (324 top) he had given his deposition and had been confronted with a discovered letter. (His deposition was not used, as he took the stand at the trial.)

Our allegation was that Baker while receiver had obtained State land contracts, that in November, 1897, he had sold Simpson two, covering Blocks 429 and 430, with a secret understanding that he, Baker, was to have himself Block 430. Notice our three explicit allegations (6, 7): (a) That Simpson held 430 in *trust*. (b) That Baker, when he after-

wards took the land off Simpson's hands through Norton, merely *reimbursed* Simpson. (c) That Baker's interest in 430 arose *during* the receivership.

Now for the original denials. Simpson having died in 1906 (133), Baker, in the apparent belief that all testimony had perished, personally answered:

First, as to the *time* of his buying from Simpson:

"This defendant denies that he as receiver or in any other capacity held the contract to purchase said tide land block for his own use or benefit after the sale to Sol G. Simpson until after he repurchased said block from Sol G. Simpson in the open market *after the termination* of his connection with said receivership." [Original end of Par. IV. changed at trial by striking out all after the word "market" and inserting, as it now reads on page 24, "which purchase was agreed on in the spring of 1899 and finally consummated in 1905."] (96-7.)

The word "spring" he narrowed by his other interlineation (p. 97) to "about the month of March, 1899," (top of p. 27).

"Q. You were still receiver?

"A. Yes, I was receiver. I did not go out for a month after that, I think." (271.)

Thus his new pleadings now confess the transaction within the receivership.

But that the original answer intended denial of transaction and even of negotiation *during* the re-

ceivership the court can see by the following, which they have left unchanged. Baker continues:

“And denies that he had *while receiver any agreement* with said Simpson, secret or otherwise, by virtue of which this defendant *was to become thereafter* the owner of said block, and that said Simpson held said block or the contract thereto subject to a secret trust or in trust, and denies that under an agreement with said Sol G. Simpson or at all while receiver this defendant was to have any interest in said contract or any of the lands described therein.” (Par. V. middle of p. 25, *left unamended*.)

Notice “any agreement * * * to become.” Thus paragraph V. stands to-day in flat contradiction of the amended end of IV.

The original purpose was to prove a purchase *long* afterwards (not shortly afterwards) and without previous trust at all. Observe:

“This defendant denies that said Simpson *ever* held said lease [meaning the harbor lease in front of Block 430] or assignment of said contract [meaning Block 430 in question here] for the benefit of this defendant.” (beginning Par. VII. of Baker’s Ans., p. 26, *left unamended*).

Next as to our allegation that the consideration was mere reimbursement:

“This defendant further denies that he from time to time or at all *advanced* to said Simpson or *reimbursed* said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block.” [End of Par. V. of Baker’s Ans., Rec. 26. This also *left unamended*.]

The Company answered, and still answers:

“This defendant further denies that said Baker from time to time *advanced* to said Simpson the sums that were paid by Simpson to the State of Washington, but avers that *long after* the said Baker ceased to act as receiver of said Bank, that *he purchased* from said Simpson the said contract.” [End of Par. V. of the Company’s Ans., Rec. p. 59. Left unchanged notwithstanding Baker’s own altered answer.]

But shortly after this suit was begun there came to light a letter written by Mr. Baker on a railway (147). He addresses one Mark Reed, the son-in-law and attorney-in-fact of Simpson. Notice the date.

[Caption of U. P. Railway] “May 9/04.

“I had a talk with Mr. Simpson in S. F. about the tide land which he holds *in trust* for me. I asked him if he would take my note in settlement of the *advances* he has made, together with the interest accrued thereon. The first two or three payments I made myself. Mr. Simpson’s books, however, will show the status of the account. There is one more payment due next March to complete the contract with the State,” etc., etc.

[That it was receivership money that made the “first two or three payments” referred to in this letter he admits (282-3), and his books account show this, too (191-2-3).]

“Q. *After the revelations contained in this letter* and several simultaneous documents, it was found necessary to amend the answer, wasn’t it? Just state that—you know it, don’t you?

“A. The answer was amended, yes.

“Q. That is known as the Seattle Water Front Realty Company’s?

“A. Yes.

“Q. Did your counsel have a conversation with you as to whether you should amend your *personal* answer in the case after that revelation?

“A. Yes.

“Q. And they decided that they would not file a new amended answer then, didn't they?

“A. No, they said they would make the amendments when the case was called.

“Q. But they said, though, they did not wish to file a formal written answer for *you* anyway, didn't they?

“A. No, they didn't say that.

“Q. But such circumstances came to pass that they considered it imprudent to reduce your statement again to definite form?

“A. Mr. Grosscup told me from the beginning that——

“Q. Never mind about the beginning—just answer that question.

“A. Will you repeat the question?
(Question repeated.)

“A. Well, they said they would have to make the amendments when the case was called.

“Q. Now, they made no amendments to this answer other than those that were made by interlineation here in court the day before yesterday at the opening of the trial. That is true, isn't it?

“A. I think so.” (294-5.)

Except for this letter Baker might have claimed, and until its exposure he was keeping his pleadings in a position to claim, repurchase as late as 1905, when Simpson conveyed through the State to Norton. This would be six years after the receivership. Now he was confronted with having acknowl-

edged in 1904 a secret ownership antedating the 1905 sale and apparently by some years.

It is difficult to see which is the more flagrantly wrong in this answer, his denying that the land ever had been held in trust by Simpson when, as will be seen, it had been held at least six years in trust, or his denying that settlement was made by reimbursement. As to this last, there could be no opportunity for error in memory, for he had had *two* settlements with Simpson, in both of which reimbursement was the sole basis. The *first* was in '99, when he secretly gave his note (what became of it, where is it, how was it ever paid?) for about \$400.00, "cost and interest" (284,271); *second*, in 1905, when he "consummated" the '99 secret arrangement. Both he himself (292-3) and Reed, who dealt with him for Simpson, agree that (not confusing the certain "harbor area lease") Block 430 was turned back to Baker in 1905 solely on the basis of reimbursement, Reed saying:

"Q. Did you receive for this land which you were releasing in 1905 anything else than your advances?

"A. No sir." (Reed, 153.)

And so, at the trial, Baker was overwhelmed by this letter.

"Q. There again *you were ignorant of this blue letter* written on the railroad *when you told your counsel to file that answer?*

"A. Yes.

"Q. In the letter of May 9, 1904, written on

the railroad, you say, addressing Mr. Reed about Mr. Simpson: 'I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon.' In the light of that letter you wish to say that that statement made in your answer is untrue both as to 1899 and as to 1905, don't you?

"A. Yes sir, it is untrue (293).

* * * *

"Q. Then it is not true in your answer when you say: 'This defendant further denies that he from time to time or at all advanced to the said Simpson or reimbursed the said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block,' that is not true then?

"A. That is not true (293).

* * * *

"Q. Now, then, you sold this property to Mr. Simpson in 1897 for less than you had paid the State of Washington, didn't you?

"A. Yes.

"Q. And when you bought it back from Mr. Simpson, as you call it, in the spring of 1899, March, I believe, was the month, you say you bought it back for what he had advanced on the property. Is that correct?

"A. Yes (295).

* * * *

"Q. Then if your answer before it was amended on the very day of this trial yesterday, if your answer then stated that you bought it back *in the open market*, that is not true, is it?

"A. No, that is not true. (291. "Open market" was left unamended after all, p. 24, notwithstanding its absolute falsity, 284, 291.)

“Q. Well, then, your counsel stated it for you after conferences and after an examination of certain exhibits, that Mr. Simpson never had held that in trust for you, you know that, don’t you?

“A. I think that is what the answer stated.

“Q. And that answer is not true, is it?

“A. No, it is not.

“Q. As a matter of fact, you now admit on the stand that he *had held it for six years in trust for you at least*, don’t you?

“A. Yes.

“Q. And you wish to put upon your counsel the burden of making a misstatement so gross as that?

“A. He can put it on himself. I didn’t know anything about the complaint” (287).

These misstatements were too gross, too, to be mere inadvertence of anybody. If, however, error of counsel so material had occurred, and if to them the blame is to be laid, then pre-eminently a duty devolved upon them of letting the client clear himself upon the stand. There he was, testifying under the gravest suspicion. Why did not his counsel ask him some such question as—Mr. Baker, by our carelessness we have placed you in a compromising position. Please explain to the court what you did tell us about purchasing from Mr. Simpson through mere reimbursement and what you did tell us as to his ever having held this in trust for you.

We are not censuring learned counsel. Their client, it is plain, had deceived them. The most

they could do was to make his answer seem a hurried one. In this again they failed. The answer was not filed until July, 1913, though the suit was begun in February (285). An extension of time, too, had been gotten from us. Moreover, Baker and Mr. Grosscup had conferred in Chicago and Mr. Grosscup had even gone to Washington to examine the Comptroller's files (285-6). All this before the answer.

As to the answer of the Company, which he owns, and of Norton, they contain equally contradicted and uncandid denials and allegations.

As to the uncertainty and the evasiveness of the answers on the point of laches, see post, p. 87.

HOW BLOCK 430 BECAME AN ASSET.

The tide lands around Seattle were appraised by the State in gloomy 1895 (117). In '97 these values were outgrown and no regard was ever afterwards paid to the State's appraisalment by purchasers (116).

Tide lands are sold by the State thus: Surveys are projected from upland into littoral. The upland owner gets the preference right to buy the tide lands, these in fee simple upon ten annual installments. (Mere contract right to buy is "realty" even before deed. *Infra*, p. 33.) Then something else accrues. The upland owner having thus acquired the "tide lands" has a right to get something addi-

tional, *the harbor area* (*infra*, p. 22). The latter he can never own, only enjoy as an appurtenance. Since a harbor lease figures in this case appurtenant to Block 430, the distinction may be kept in view though the item is of small importance.

The tide lands (not the harbor lease area) are subject to a well-known filling contract which the State made for Seattle harbor and which gives to a certain company a right to fill all such lands, notwithstanding the State may be selling them. This charge does not figure in values and lands are freely trafficked in subject to the filling rights, the market price meaning price subject to balance due the State (215).

Such is a general sketch of these littoral rights. Baker in January, 1897, addressed to the Comptroller Plaintiff's Exhibit 3 (98). He invites the Comptroller to "ratify" contracts he has made for the purchase of a group of tide land blocks as "upland owner." Among these was Block 430, by all testimony the largest and most valuable (118, 166). He calls this a "valuable asset of the estate." The Comptroller ratified them, mentioning their assignability.

The contract (numbered 728), calling for ten annual payments aggregating \$1488.00, Baker made out of trust funds two payments of \$148.00 each (191, 192-3, Journal Entries 1/12/97 and 3/31/97), and the contract as an asset was listed in his journals under "Additional Assets Good" (193).

THE SALE TO SIMPSON, '97.

In October, 1897, one Seeley, an examiner of the Department, visited Seattle. On his advice there was obtained from the Federal court a general order concerning the sale of assets. (No asset is in law salable on mere direction of the Comptroller or Receiver, but only on the order of a court.) This order we discuss fully, *infra*, p. 31. The lower court held properly that it authorized nothing but sales of personalty. (Our Addendum 1, *infra*. p. —.) However that may be, all are agreed that it authorized only a sale of *bad and doubtful* assets. Seeley himself writing to the Department (122-3) so speaks of it.

It was conceded at trial that the right of Baker to sell this asset rests only on this order and no other (120).

Baker follows Seeley's report with a letter October 29, 1897, giving a rosy picture of the future through the Klondike discoveries. Property is rising in value! "The next six months" of the trust, he says, will be among the most active in its history (103, bottom). Yet a month after this letter he sells this asset to Simpson for less, he admits (295) than he had paid to the State a few months before. How this error, if error it was, occurred is nowhere explained, yet all must agree under the testimony that the market was not falling, but was rising.

So Baker, keeping unsold the estate's adjoining tide lands, sold to Simpson in November, '97, Blocks 429 *and* 430 for \$315.20. For 430 he got \$198.00 (108), but the amount paid by him on 430 alone had been \$296.00 and interest (115, 191, 193). Here was a positive loss. Yet Block 430 was reasonably worth from \$1000.00 to \$2000.00 in '97. When we say "worth" we mean, of course, above the balance due the State on the purchase price, deferred State payments not being considered in the market (215).

Nor can Baker say that the subsequent fate of his other tide lands, not sold to Simpson, justified his judgment in '97 as to 429 and 430. On the contrary, he admits that the others were sold by him within thirteen months at very marked advances (289, 290 and Addendum 4), he getting for merely contested (290) rights in a portion of the inferior Block 431 \$1000.00, besides a profit of \$750 to Anderson.

In fine, nothing in 1897 justified the sale to Simpson at less than a fair profit. Simpson's payment was nominal.

This price, if noticed, doubtless passed as a mere bad bargain, for his now alleged repurchase at "cost and interest" thirteen months later had not then come to light to expose his own interest in the price.

Seeley, for his part, had nothing to do with the sale to Simpson, only with getting the general order of court. After his report he apparently left Seattle for good.

As to Baker's advising the Department of this sale to Simpson only a line appears in a voluminous *general* report the next day, November 30 (Plf.'s Ex. 9). Comptroller Eckels, his father's friend, whose request a year before that he get his note liability adjudicated he had been able to ignore, was still Comptroller, but shortly after the sale a new Comptroller, Dawes, came in. He called, April, 1898, for a *special* report on everything done under the Seeley order, "the name of the purchaser, the date," etc. (129). Baker did thus specially report, *but wholly omitted this sale* (131). It is impossible to read these two exhibits and feel that Baker was not concealing this sale. On the stand he offered no explanation of this special report.

The period of change between the two comptrollers was a happy one for concealment by Baker. Your Honors will not fail to notice the effort of the new Comptroller to be fully advised in this report.

THE '99 REPURCHASE.

The lower court, in view of Baker's contradictions, his tardy explanation of a "repurchase," the nominal price paid *by* Simpson to begin with, and the mere reimbursement paid to him later, found an understanding with Simpson beforehand (Opinion Addendum 1, *infra*. p. 116.) and an original fraud (decree 78). Perhaps the court did not fail to notice also the following mode of questioning their client on the vital question of a secret understand-

ing with Simpson in '97. We had distinctly alleged (6) that he had sold Simpson *two* blocks, 429 and 430, "with the secret agreement that Simpson should hold Block 430 for the use and benefit of Baker."

Now, observe:

"Q. At that time, Mr. Baker, and for a considerable time after that, did you have any reserve interest, in expectancy or actual, present or in expectancy, in *these two contracts*?

"A. I did not.

"Q. Did you at that time have any expectation of ever acquiring any interest in *those two contracts*?

"A. I did not" (262).

It would be very doubtful whether on proceedings against him for false testimony Baker would be liable if his reserved interest was not in both but only in one. This form of question, put twice deliberately by his counsel must strike the attention of this court.

As to repurchase in '99, the court, without expressly finding that there was none, indicated that whatever then occurred was simply in pursuance of previous arrangement in '97. It is absurd to say that Simpson, without previous understanding, would have resold in the spring of '99 Block 430 for the sum that Baker pretends, \$300.00 or \$400.00, mere reimbursement of cost and interest.

Here is Baker's cross-examination:

"Q. You as you say bought back Block 430 from Mr. Simpson while you were still receiver—

Block 430 of Seattle Tide Lands, in the spring of 1899 while you were still receiver, for just what he had expended on it, is that true?

“A. That and interest, yes.

“Q. What? and interest?

“A. Yes.

“Q. And what was the amount which you gave him?

“A. I think it was about \$400.

“Q. About \$400.00—you have also testified that you thought that to be the *value* of Block 430 at that time, have you not?

“A. Yes.

“Q. And it is in evidence that you sold—it is also in evidence that at that very time you sold to what you call Pigott and Hofius your merely contested rights in the adjoining Block 431 for \$1000. Is that so?

“A. Yes.

“Q. Mr. Baker, what did Mr. Simpson give you as evidence that he had thus transferred back to you while receiver a title in that land?

“A. He did not give me anything.

“Q. *Did he give you a scrap of paper?*

“A. No, he did not.

“Q. *He continued to hold it exactly as he had held it since 1897, didn't he, as far as the public record is concerned?*

“A. Yes” (284).

Baker is asked again:

“Q. And in 1899, when you bought back Block 430 from Mr. Simpson, while you were still receiver, you paid him for this large Block of twelve acres

only \$300.00 and interest, and you sold the adjoining land, which you were in litigation about—your mere contest interest in it—for \$1000.00 at least, didn't you?

“A. Yes.”

“Q. And they were simultaneous transactions, practically?”

“A. About, yes.”

(P. 290, and see Addendum 4 *infra*.)

Sum - out found the 19, value between \$5000 and \$15,000. Inf. a 116.

As to notice to anybody of this transaction it is not so much as claimed by Baker that he gave notice to anybody, either Comptroller or creditors, or that the “repurchase” was by anybody whomsoever actually discovered. He does not even allege as much in his answer, but only that what we complained of in the *complaint* were the things we had knowledge of (70). Now, our *complaint* alleged an original sham sale in '97. It is he, not we, that alleges, “repurchase.” It is their amended answer that sets that up and yet does not allege either notice given or knowledge acquired.

SALE BY STATE (SIMPSON) TO NORTON, 1905.

The settlement with Simpson through his son-in-law, Reed, occurred in August, 1905, *on mere reimbursement* of his advances (153), as contemplated in the railroad letter of May, 1904. The sum was about \$3000.00, inclusive of the “harbor area” (153, 163). Block 430 was then worth \$80,000.00 (166).

Norton, called as our witness, confesses his part. In 1905 the conveyance passed directly from the State Land Office at Olympia to Norton of New York, whither Baker had just removed from Seattle (305). Baker's lawyer and intimate friend, he paid nothing for the land (174, 60). He never had been in Seattle until 1912 (185). A deed recorded to Norton could attract no attention. Even Simpson's name did not go on the King County records, for Simpson assigned the contract in the Land Office and then the deed leaps from the State in 1905 directly to a gentleman in New York. (Our allegation, pp. 8-9; answer 61-2.)

In those seven or eight years not one document (except the bare sale *to* Simpson) had been filed in the Land Office connecting Baker or anybody under him with this property again, nor any document of any kind relating to Block 430. Hence if anybody had taken the pains, out of a wild suspicion that Baker and Simpson had long before had secret connivance, to ransack the files of the Land Office between 1897 and 1905, he could not have found one thing there except what all knew was there long before, the simple sale or assignment of the contract on Block 430 by Baker, Receiver, to Simpson. Nor even between the parties was there a "scrap of paper" until Baker's railroad letter of May, 1904, to Reed. On the settlement with Reed in 1905 the first writing is filed in any public Office.

A correspondence is then begun with the Land Office by Norwood W. Brockett and by Mr. Hardin, Baker's Seattle lawyers. Several letters (it is now 1905) pass from these gentlemen to the land office, and in every one of them they ask the Land Office to make a transfer from a Mr. Simpson to a Mr. Norton. *Not one line mentions the name* of Charles H. Baker, in whose employment each of these gentlemen then were engaged as lawyers (308, 310). No such natural language occurs as, At the request of Mr. Charles H. Baker we desire you to transfer from Mr. S. to Mr. N.; or, We have been requested by Mr. Charles H. Baker of this city to have you transfer, etc. Each of these letters omits Baker's name. Baker admits this and offers no explanation (310).

These letters (248-253) are further curious in that all of them except the last proceed still further in point of caution. Note the captions on each. They invite reply "to N. W. B., personal." The last invites reply to "N. W. B."

Here we may note a point. Baker, as one of his excuses for concealment, says that he had been very much in debt. *But in 1905 he admits he was out of debt.* "Oh, I was out of debt in 1905, completely out of debt." (304). Why not then take the asset in his own name? He attempts the explanation that he thought of going to Korea or China. In point of fact he did not go (175), but supposing the intention, he could as easily have taken the title in his own name and left a power of attorney with Norton.

The question why he did not do this was put to both Norton and Baker and no explanation was offered by either (306-7). Observe, too, his caution as to connecting his checks with this property. There being a balance, exactly ascertained, due the Land Office, he does not make his check to the Land Commissioner, but to Reed, Simpson's attorney in fact. This check, Reed, apparently distrustful of Baker (154), forwarded instead of his own personal check. And there was still another check, this to pay taxes. Notwithstanding these were known to a penny, \$691.51, Baker does not make his check payable to the county treasurer, but to his lawyer, Brockett (279). If your Honors will look at this check (Deft.'s Ex. A-10), you will see that the lawyer at least had the caution not to endorse it to the treasurer. He evidently paid in cash or by his own check.

Norton, as we say, confesses that he never gave anything for the property. So he gave Baker two declarations of trust, before he conveyed it for him to the Realty Company. Neither trust paper was ever recorded (306). If they had been, it might have become known that Baker had acquired twelve acres of tide lands, the first and only thing to attract attention. Thus the property was two years in Norton's name, 1905-7, under unrecorded declarations of trust to Baker.

SALE BY NORTON TO THE REALTY COMPANY IN '07.

Norton confesses his part in this additional step. The company was organized in Seattle with dummy directors holding trivial shares (175-6). Then all the records were whisked out of the State to New York, where they have ever since been kept (184). Baker received all the stock except about three per cent. From that time to the present Baker has been the holder of 90% and upwards of these shares (180). Norton holds 3%; the rest went to friends as gifts (178). Yet Baker has never been a director in that company (307). The laws of the State of Washington (Laws '95 p. 355; Rem. & Bal. 3691) required companies to file annually a list of their directors. The caution of Baker is unmistakable. All his shares except 250 were kept in Norton's name; so for six years, 1907 to 1913, when this suit was commenced, a certificate for 1933 shares in Norton's name (180), endorsed and delivered to Baker, has remained unchanged.

This Company was organized by one Meacham, who got four shares (176). Meacham and Norton had a great deal of correspondence about it, but never through Baker (183), though it was through Baker that Meacham's name was obtained by Norton (75), for as stated above Norton was never in Seattle until several years later, 1912. Baker did not subpoena Meacham. Asked why not, he gives no fair explanation (309). We, for our part, tried to subpoena this gentleman (189).

It was not sought to be shown by the defense that the Company gave for the land anything but its capital stock, or any money at all except such portion as Norton or Baker between 1905 and 1907 might have advanced for taxes and also for Norton's professional services. Only one portion of the stock of any moment has passed for something like value. This has gone to his wife, who divorced Baker for desertion. It is held by a trust company in Seattle, but Baker is wealthy and she holds plenty of other securities.

THE HARBOR LEASE.

All that is known of this is that when Baker came to settle for Block 430 with Reed (Simpson) in 1905, the latter insisted not only on reimbursement of taxes and previous Land Office payments, but that a lease, Harbor Lease 181, be taken off his hands (163). This species of property we have described, *ante*, p. 11.

Reed insisted that as Baker was making him deliver 430 he should take the lease with it, for without 430 it was worthless (163). There was some wrangling. Finally a flat sum of \$2000.00 (over the \$1077.00 due the State) was agreed on as covering reimbursement items already due Simpson on 430 *and* the value or cost of the lease. After a vain effort on the stand Reed was unable to apportion the amount of reimbursement, nor did Baker attempt, though following him in the trial, to distribute them.

In our tender we included this whole \$2000 and interest.

BAKER'S SECRECY.

1. Obscurity in *general* report of November, '98 (See Plff.'s Ex. E), where he refers to the property by contract numbers and not by the *block* description which he had used to get authority to buy (98). See his examination on this peculiarity (296-8).

2. Concealment entirely of the sale to Simpson in his requested *special* report of April, 1898, to the new Comptroller (130).

3. Complete concealment in April, 1899, from his successor, Frater, who saw him frequently (168).

4. Admitted secrecy between himself and Simpson from '99 down to 1905, the transfer to Norton. "Six years in trust" (287). William Pigott making repeated attempts *after* '99 to buy, was told by Baker that Simpson was the owner (330).

5. Proved secrecy from 1905, though admitting himself out of debt after that date (304).

6. "Brockett correspondence," 1905, on behalf of Baker with the Land Office, conducted by his attorneys, Hardin and Brockett (248-253). The name of Baker is entirely omitted and only Norton and Simpson mentioned. Baker out of debt and able to avow transaction if innocent.

7. Making his checks not to the Land Office and to the Treasurer, when in the settlement with Simpson (Reed) he had these payments to make, but to Reed and to Brockett, though the amounts due the public offices were known to a penny—\$1079.28 to the Land Office and \$695.50 for taxes. The check to Brockett (*supra.*) was not even endorsed over to the County Treasurer by that lawyer.

8. Transfer in '05 indirectly from Simpson through the State to Norton, Simpson's assignment of the contract to Norton never being recorded (*supra.*).

9. Transfer not to Baker, but to his lawyer in New York.

10. Withholding from record Norton's two declarations of trust.

11. Organization of the Realty Company by dummies.

12. Immediate and permanent removal of all records of Realty Company to New York.

13. Baker's withholding himself from the directory of the organization at all times since its organization ('07), though he held never less than 97% of the stock, and his keeping nine-tenths of his holding in Norton's name.

14. Extraordinary reticence to J. B. Hill, formerly his bookkeeper in the trust, on intimate terms with him ever since.

15. Failure to call as witness his lawyers, Hardin and Brockett, the former “acquainted with his relations with Simpson” (309) and the latter the one who concluded the transaction with Reed (309).

16. Failure to call Meacham, who organized the dummy corporation, and failure to call so much as one witness to say that he knew of Baker’s interest in 430 even after 1905, or to say that anybody in Seattle knew of it.

17. Failure to say that *he* ever had told *anybody* except Norton either in early or recent years.

18. *Fourteen years’ ownership of this property and yet never once in his own name.*

19. False denials in all the answers.

(a) They deny that the bank ever had even the “preference right” (22) to purchase tide lands in the face of his own contemporary letter stating this very thing (98) and obtaining it from the State!

(b) They allege that this right had no “substantial or any value” (23) in the face of his letter (98) saying this right was “a valuable asset of the estate,” and they call it a “desperate asset” (22) when they had listed it as “good” (193) and every transaction after it was acquired showed increasing value.

(c) They allege that the assignability of this right was “limited in time” (22), to support which

there is neither evidence nor law and which is contradicted by his assigning his remaining contracts two years later. He himself had assured the Comptroller of their being "assignable," and the Comptroller had answered, noting this very advantage (98-9).

(d) They allege he sold 430 to Simpson for "more than the amount" paid the State (23). Baker admits he sold to him for less (295).

(e) False denial as to the time of repurchasing, *supra*.

(f) False denial as to the "advances", *supra*.

(g) False assertion as to buying from Simpson in "the open market," *supra*.

TESTIMONY OTHER THAN DOCUMENTARY.

Except as to values, Baker called no witnesses other than his bookkeeper, J. B. Hill. The latter throws little light on the transactions, and he did make the damaging admission that during twenty-three years' intimacy with Baker he had never learned of his owning an interest in these twelve acers of tide lands.

"Q. You never heard from Charles H. Baker or any one that Charley Baker had an interest in Block 430 until about the time this suit was brought, did you, Mr. Hill?

"A. Not until some time after the receivership was closed out.

"Q. Some time after this present suit was brought—you never heard that Charley Baker

claimed an interest in Block 430 until this suit was brought a year ago, that is a fact, is it not?

“A. Yes” (239-240).

* * * * *

“Q. Talked about his children and his wife and his prospects, and his luck, bad and good?

“A. Yes.

“Q. And you were closely associated in those years, 1887, 1898, and 1899?

“A. Yes.

“Q. Very intimate?

“A. Yes.

“Q. And after that your friendship continued?

“A. Yes.

“Q. He stayed around here for six years afterwards, until about 1905, coming and going a little, but he stayed here as a resident?

“A. Off and on, yes.

“Q. And when he would come back, he would see you pretty often, and you would see him in a friendly manner?

“A. Always friendly.

“Q. Always friendly, and talked freely together in all these years, didn't you, until he finally left here in 1905, or about then?

“A. I think that is so.

“Q. That is a fact, is it not?

“A. Yes.

Then he says that after Baker left Seattle they frequently met.

How Baker could undesignedly avoid all these years mentioning to this man his ownership of a property once handled in common, it is not easy to see. Of all men Hill, formerly the trust's book-keeper, was the last whom Baker dared to tell.

As to other witnesses, we have already commented upon his not calling his lawyer, Hardin, who he admits "knew of his relations with Simpson," or Brockett, his other lawyer, who "closed the transaction" in 1905 with Reed, or Meacham, who organized the dummy corporation in Seattle. He would give no explanation why he did not call these. (309,310).

The authorities are unanimous that defendant's failure to call witnesses such as these raises a presumption that their testimony would be unfavorable to him.

Re Kellogg, 113 Fed. 120, affirmed in 121 Fed. 333. Action by trustee in bankruptcy to set aside mortgage. Failure of holder of mortgage to call mortgagee. The *Joseph B. Thomas*, 81 Fed. 578, per a member of this court; *Norguet v. Paramount Mills*, 177 Fed. 970.

The general rule is well stated by the Supreme Judicial Court of Massachusetts in *Cheny v. Gleason*, 126 Mass. 166, a bill in equity by principal against agent in fraud.

"The neglect of a party to produce evidence which is in his own power is a fact to be considered by the jury in connection with all the other facts,

and in a case of fraud, *the parties to which are within reach as witnesses, may be of great weight against him.*”

We, for our part, had human testimony as well as documentary. Two men in confidential relations with Simpson testified to admissions made by him. One was Rotch, bookkeeper for Simpson. He places the date of admissions by Simpson after 1900. In one talk Simpson stated he *never* had had any interest in this property himself (140-143). Turner, president of the First National Bank, of which Simpson was a director, relates two talks. Simpson had said of this transaction “it would not bear investigation.” One was after 1900, the other approximately in 1898-9 (144-5). If in 1898, it antedated even the alleged repurchase of '99, and that it was before that seems clear because Simpson's words, as quoted by Turner, were that a *portion* of his tide lands belonged to Charley Baker. That would mean that Simpson still had some at the time of this conversation. Now, after the spring of '99 he had none, having sold No. 429 to Pigott and Hofius.

The legal admissibility of these admissions will be discussed *infra*, p. 70.

Reed's testimony was that in 1904 Simpson, being unwell and going to California, gave him an account of his assets. Block 430 “was Baker's” (155-6).

The court will finally be struck by the failure of Baker to call so much as one witness to prove

that his interest in *Block 430* was known to another soul in Seattle, even after 1905. Why did he not call business men, neighbors, or what not, either in Seattle or in New York, to show that to them at least he made no secret of his ownership? He had lived in Seattle from before 1895 down to 1905, and had organized companies there for his rich father.

Yet he calls not one. And what he ought to have called to his aid is made more prominent by one feeble intimation. McGraw & Kittinger, real estate men in Seattle, he said, had written him one letter in 1906 about buying the property (281). Then a court naturally asks, Have you only one such evidence? Or, since you so mention one, where is their letter or a copy of it? Or, if you have lost it, why do you not call one of that real estate firm to testify? Again, Norton, your attorney, saying that in the course of a year he wrote from New York to Meacham, the dummy director in Seattle, as many as 50 or 100 letters, believes that you never wrote a letter yourself to Meacham (183). This is the Meacham against whom we issued a fruitless subpoena (189). Why did they not call Meacham? Does Baker's faint explanation on page 309 seem adequate? Norton indeed tried to say that occasionally somebody would come to him in New York about the land, stating that they had seen Mr. Baker. We call it a feeble effort, for when pressed he soon became so vague about these that no court will attach importance to the statement (183). Perhaps Mr. Baker told such persons that it was Norton

who owned the land, just as he had told Pigott, between 1900 and 1903, that Simpson, not himself, was the owner (330).

As to Simpson's testimony "lost by death," their actual gain in this respect, See post 75.

All living witnesses testify against Baker, (Reed, Turner, Rotch and Pigott) and he fails to call his living lawyers. Norton was made to testify by our process.

LEGAL CONCLUSIONS.

1. The sale to Simpson in '97 was void.
2. Even if good in law it was actually for Baker's benefit.
3. The repurchase, whether in '99 or in 1905, inures by law to this Receivership.

CONCLUSION I.

THE SALE TO SIMPSON IN '97 WAS VOID IN LAW.

For two reasons:

(a) The court's order never authorized the sale of real estate and (b) only the sale of bad and doubtful assets.

First. The lower court (*infra* p.) found that the Seeley order of court contemplated only personalty. We can see no other conclusion possible.

If tide land contracts be real estate, then there never was a court order for this

sale. And an order of court, let it be remembered, is essential. While a receiver, under §R. S. 5234 proceeds under the direction of the Comptroller, he can pass no title by that mere direction, and the order of court is equally indispensable.

R. S. 5234.—“Such receiver, under the direction of the Comptroller, shall take possession * * * and upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful assets, and on a like order may sell all the real and personal property of such association on such terms as the court shall direct.”

As the Supreme Court said in *Turner v. Richardson*, 180 U. S. 87:

“The receiver (of an insolvent national bank) here could not sell the collateral in his hands without obtaining an order of a court of competent jurisdiction. This order must fix the terms of sale.”

The authorities are overwhelming.

Richardson v. Turner, 28 So. 158 La.

Ellis v. Little, 27 Kas. 707.

Tourtelot v. Booker, 160 S. W. 293.

Bodwell v. Rice, 19 Wash. 146.

Wallace v. Hood, 89 Fed. 11.

In re Earl, 92 Fed. 22.

Now, does a contract for the purchase of tide lands though still executory and not yet merged in conveyance, invest the purchaser with realty under the laws of Washington? The answer is emphatically in the affirmative.

In *State v. Superior Court*, 31 Wash. 445, which was a *tide land* case, held:

“In equity, upon an agreement for the sale of lands, the contract is regarded for most purposes as if specially executed. The purchaser becomes the equitable owner of the lands and the vendor of the purchase money. After the contract the vendor is the trustee of the legal estate of the vendee. Before the contract is executed by conveyance, the lands are devisable by the vendee and descendable to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money.”

And in *Washington Iron Works v. King County*, 20 Wash. 150:

“In equity *upland right owners* possess a real and substantial interest which they can transfer and assign as they choose, and the State cannot deprive them of this right. The term ‘property’ as applied to land comprehends every species of title, inchoate or complete.”

In eminent domain on tide lands the same doctrines, *State ex rel Wilson v. Gray’s Harbor*, 60 Wash. 32, and in *Book v. Thomas*, 61 Wash. 607, held that the preference right of the upland owner descends *to his heirs*.

The right evidenced by these tide land contracts has notoriously conferred the highest attributes of possession. Great buildings are sometimes erected before the deed is issued or even applied for. The quality of title is far greater than that of any occupant-locator of an unpatented mining claim, yet the title of such an occupant has been declared by the

Federal Supreme Court to be real estate of the highest quality descending to the heirs.

Moreover, it is not for this defendant to argue that it ought not to be considered realty. He himself classed it as such in a circular advertisement, in 1897, of the trust assets (224, Deft's Ex. A-2).

(b) Even if the asset be not realty but personality, it was clearly not bad and was not listed by the receiver as "bad or doubtful," as restricted by order of court, but as *good*. (193). Selling as a bad and doubtful asset what was really good might indeed give title to some innocent purchaser as mere discretion exceeded, but the property stayed in Baker's own hands or came back to him by an arrangement existing, as he admits, during the very receivership itself. Such a person is not an innocent purchaser of the asset. He at least must know that he had violated the terms of the order of court.

CONCLUSION II.

EVEN IF GOOD IN LAW, THE SALE IN '97 WAS REALLY
MADE FOR BAKER'S OWN BENEFIT.

This is a question of fact to be sustained by a perusal of the testimony and the opinion of the lower court. We shall not attempt to go over the facts but leave them as already stated.

The authority of findings by the lower court has long ago been established by Federal Appellate

Courts as not to be overturned except upon strong showing. This rule, which sprang up even under the system of depositions, has now five fold its force when the judge, as in this case, has the witnesses before him, sees their faces, hears their voices, and is influenced, as he ought to be, by their demeanor.

CONCLUSION III.

THE "REPURCHASE," WHETHER IN '99 OR '05, RESTORED THE LAND TO THIS ESTATE.

Under the overwhelming proofs and the finding that a secret agreement existed when the property was sold to Simpson in '97, it is perhaps of little moment to consider a subsequent repurchase. But defendant is at all times in this case confronted with the court's right to take him at his word, even if it does not believe him. His own story of this repurchase we have set out (*ante* p. 14), from which it is clear that while the repurchase was "consummated" in 1905, it was "arranged" in March '99 while he was receiver.

A purchase by a trustee during his term, unless authorized or ratified, is void in law no matter whether the original sale was valid and in good faith, and no matter whether the repurchase was for a fair consideration.

A plausible view contrary is as follows: If the original sale was without reserved interest, then the asset left the estate and the estate is in no way

prejudiced if the trustee buys it back. Somebody else might have bought it from the original valid vendee, why not the trustee?

But this is directly contrary to decisions deeply founded in public policy.

Let us first consider why the law forbids a trustee's selling *directly* to himself. Then we shall see why the law forbids his buying back from somebody else and thus *indirectly* selling to himself. Take the first case. I give a power of attorney to Jones. It is unrestricted, both as to things to be conveyed and persons to buy. Jones sells to himself, conveying my property of record from me, X, to him, Jones. I complain, of course, but he proves by overwhelming testimony that he deposited to my account five times what the place was worth; the testimony is unanimous that he has paid me five fold; I myself admit that he has paid me five fold, yet the thing is void.

Now, why? Because the thing, fair in some instances, would as a rule be utterly against public policy. If my agent can do this when he means me well, he can do it when he is really cheating, knows secret values in the estate, of mines, deposits, or impending improvements.

If he can do it when I am near, he may do it when I am far away. Upon me he places the burden of overturning the thing if, as we are supposing now, the thing is presumptively valid. But the law says that the principal must not be put to such a burden. Not only must the agent not be tempted to

do wrong, but no principal must be put in a situation where, being in doubt about a transaction, he must either accept it or bring a lawsuit at great cost, annoyance and doubtful result.

But is it different if the agent, having sold to another in good faith, merely buys back? No. There again the principal would be put to an unfair burden. My agent has sold a piece of property to a third person. I hear of it, am not quite satisfied with the price, but still think it only an error. A little later I hear that he has purchased the property himself from the vendee. Then I am suspicious, especially if he has bought it back at mere cost and interest, but even if at a fair price, I am not satisfied with this kind of thing. I complain. His reply is, "Sue me. The law being that I have a right to repurchase though still your agent, you cannot win unless you prove a secret agreement in advance. Sue me." I, for my part, am helpless. What chance shall I have in such a lawsuit? To suppose that two men would make such a secret agreement, is to suppose that they would deny it. I must accordingly sue two persons who have every reason in the world to swear me out of court. I must contest not mere prices but secret motives.

In the illustration I am supposing that I heard of the original sale, *to* the vendee, and did not try to set that aside. It is when the repurchase by my agent occurs that my right to complain accrues, for it is this repurchase that throws a badge of fraud on

the original transaction and makes me distrust what at first seemed only a mistake or a fair sale.

Lamentable indeed is the situation of creditors and stockholders if national bank receivers throughout this country handling millions of dollars' worth of securities, shall have the privilege of buying back at mere cost and interest or at all. Still more lamentable if these receivers are to have the privilege not only of buying back but of keeping the repurchase secret.

In *Boynton v. Bristow*, 53 Maine, 362, real estate was sold by the executors. Subsequently one of them bought it back.

"We are satisfied that the property was sold not for the largest but for the smallest sums possible. There may not have been any express agreements to that effect—most likely there were not—but it is impossible to believe that the executors did not expect to be able to buy it back again for the benefit of the heirs at the same price for which it sold."

This though there was *no finding of a previous agreement* of repurchase with the original vendee. The court added:

"It is enough, however, for us to know that the property was redeeded to one of the trustees for the same consideration for which it was sold before his duties as trustee were ended. Equity will not permit a trustee thus to deal with a trust property except for the benefit of the *cestui que trust*... Sound policy requires all the skill and efforts of a trustee to be used for the benefit of the *cestui que trust*, and to secure this end his private interest must not be allowed to come in conflict with his duty. If a trustee should be allowed to sell the trust's estate and then immediately buy it back for his own bene-

fit, his private interests would be in direct conflict with his duty. To enable him to buy cheap he must sell cheap. Instead of making known its good qualities and its real value and the true state of the estate, he would be influenced to disparage the estate by concealing, as far as he could, everything which would enhance its value, and to avoid clearing up any clouds that might hang over the title."

One of the leading cases in this country is *Michoud v. Girod*, 4 Howard 503. At a judicial sale validly and legally conducted a piece of property was sold at a fair price. The purchaser within a short time reconveyed to the executors individually. It was decided that the buyers at the sale were purely nominal, their reconveyance to the executors being at no advance. *Twenty-seven years passed before attack was made* by the heirs, and within that time the beneficiaries had some of them given releases, but the court said (p. 553):

"The morality and policy of the law as it is administered in courts of equity induce us to add that these purchases were fraudulent and void and may be declared to be so without any further inquiry, upon the ground that they were made through the intervention of parties who were nominal buyers of the property for the purpose of reconveying to the executors. Such a transaction carries fraud upon its face. The rule of equity in every jurisprudence with which we are acquainted is that a purchase by a trustee or agent of the particular property of which he has the sale or for which he represents another, whether he has an interest in it or not, *per inter positam personam*, carries fraud on the face of it." (Further of this case *post*, 68).

In *Creveling v. Fritts*, 34 N. J. Eq. 134, a purchase back by an executor, though at a fair price, was commented on as follows:

“The rule is now universal that no matter how fair the purchase by a trustee may be nor how ample the consideration he pays, the *cestui que trust* is at liberty in every case to set the sale aside, because if a trustee were permitted to buy in an honest case he might likewise buy in a case having that appearance, but which from the infirmity of human testimony might be grossly otherwise. Thus a trustee for the sale of land may, by the knowledge he acquires in the performance of his duties, ascertain that the land has an extraordinary latent value, as for example that it contains a deposit of valuable minerals or some other hidden treasure, and locking up that knowledge in his own breast, he might purchase the land for what might seem a fabulous price and yet get it for a mere tithe of its real value.

“The rule upon this subject is a wise public regulation, intended to protect a species of property which otherwise would be constantly exposed to peculiar hazard.”

Baker, an engineer (254), foresaw better than anyone else the strategic position of these twelve acres.

Guerrero v. Bellerino, 48 Cal. 118, repurchase by administrators one month after the administrator had been discharged. Some years elapsed and the intermediate purchaser from whom the administrator acquired the asset died. Yet an attack by the heirs was sustained.

These great principles receive further confirmation in *Robertson v. Chapman*, 152 U. S. 673 (Its

official syllabus contains an admirable statement of the general doctrine.) The court says (p. 681):

“He could not directly or indirectly become the purchaser and maintain any title thus acquired as against his principal; for, in so purchasing his duty and his interest would come in conflict. * * * and this will be done upon the demand of the principal although it may not appear that the property at the time the agent formerly acquired it was worth more than he paid for it. The law will not in such case impose upon the principal the burden of proving that he was in fact injured.”

In that case the agent was upheld in his repurchase for the following reason:

“That the defendant Pope *did not intend to conceal* the fact of his purchase is made clear by his letter of May 1, 1886, in which he notified the defendant that he had ‘traded O’Donohue out of the property’.” (p. 683).

Most carefully did the court guard the principles enunciated above, saying:

“Upon this ground the decree below can be sustained without impairing in any degree the rule that an agent will not be permitted to become the purchaser without the knowledge and consent of the principal.” (pp. 682-3).

So far as *repurchase* here is concerned, neither Baker nor his company even alleges in answer that we had knowledge of that. It is of the things in our *complaint* that he says we had knowledge. (70, line 18). Now, our complaint never mentions repurchase, only the original sale in fraud *to* Simpson.

French v. Woodruff, 54 Pac. 1015 (Colo.) much resembles this. The executor sold the land to a

third party, from whom he subsequently took back conveyance, then got an order settling the estate and *discharging him*. After ten years' delay the beneficiaries recovered. Observe, after ten years.

“It may be full value was paid. But to permit such dealing opens the door to fraud and the law deems it the only safe way to put the trustee beyond temptation. * * * The beneficiary therefore at his election may have such a sale set aside or hold the trustee purchasing as still a trustee for his benefit *and may require an accounting of all advantages* that have accrued to the trustee from the sale *without any further showing than the mere face of the purchase during the continuance of the trust.*” (p. 1019 of the Reporter).

Wilson v. Brookshire, 25 N. E. 131 Ind. also a strong case. An agent to collect and disburse moneys to pay a corporation's debts bought a judgment instead of satisfying it.

“By accepting the trust and entering upon its performance, Wilson assumed such a relation to the property in controversy that he became disqualified from acquiring any right in it hostile to those in whose behalf he was acting, without their consent, and this was so *whether he contemplated any fraud upon them or not.*”

The Washington Supreme Court of a purchase by an agent through a third party, says:

“It is of no consequence in such a case that no fraud was actually intended or that no advantage was in fact derived. The rule is not remedial of wrong actually committed—it is intended to be preventive of wrong.” *Hay v. Long*, Wash.,, March 25, 1914.

These self-purchases are, however, not void but voidable. They can be cured by silence in the cestui after knowledge unequivocally brought home. Cases upholding them on that ground are referred to under "Rules of Express Trusts Apply Here." (*post*, p. 62).

LACHES.

If the sale to Simpson was void, then not laches but only Statutes of Limitation can be considered.

If our contention that, because this asset was realty, it never was legally sold at all be correct, (*ante* p. 31), then laches is not involved, for the asset is still in the trust. Only statutes of limitation could be applicable. Now the Washintgon statutes cannot be invoked because neither Baker nor his voluntary transferees can set up *color of title* or *good faith*. In the lower court the statutes were apparently abandoned.

Rem. & Bal. §788: "Every person in actual open and notorious *possession* of lands or tenements under *claim and color of title* made in *good faith*, and who shall for seven successive years *continue in possession* and shall also during said time *pay all taxes*," etc.

Rem. & Bal. §789: "Every person having *color of title*, made in *good faith*, to *vacant and unoccupied land*, and who shall pay *all taxes* legally assessed thereon for seven successive years," etc.

While seven years' tax payment has been pleaded here, no serious argument was made in the

lower court that Baker could come within the color of title and good faith requirements. *Seymour v. Dufur*, 53 Wash. 646; *McDowell v. Backham*, 72 Wash. 224; *Pettigrew v. Greenshields*, 61 Wash. 614; *Deffebach v. Hawke*, 115 U. S. 392; *Lindt v. Wiglein*, 89 N. W. 226.

LACHES (a). *The Comptroller's Relation to a Receiver-ship.*

Our opponents debate as if this were merely a controversy between them and the Comptroller. This is their first and persistent error. They are widely wrong. This is a controversy between Baker and his cestuis, the depositors.

We think the Comptroller's office showed actual diligence about Baker's affairs, but no matter. Neither negligence nor silence after actual knowledge in the Comptroller could have affected this case at all.

Laches must arise in the distributee, heir, or beneficiary, not in an officer having the duty to send him his share. Neglect by a comptroller would only add to the wrongs of depositors, not estop them.

For what is the Comptroller? He is himself a species of receiver. He alone determining without judicial inquiry whether the bank is insolvent, it is for his office to wind up its affairs. One of the instruments allowed him is a receiver. These he appoints without hearing and removes without

notice. "The receiver is the instrument of the comptroller." (*Kennedy v. Gibson*, 8 Wall. 498). To the Comptroller alone are the receiver's accounts transmitted. By him alone are they approved and passed upon without notice to creditors thousands of miles away.

"The receiver shall pay over all moneys so made to the treasurer of the United States and also make report to the Comptroller of all his acts and proceedings." (R. S. 5234).

Under the very general statute have come decisions distinguishing the relations of these two officers, and it is clear that while the Comptroller has a less intimate trust than the receiver, he also is a fiduciary.

The receiver, on the one hand, is "the owner of the title." *Bank v. Colby*, 21 Wall. 609; *Scott v. Armstrong*, 146 U. S. 499. He is "the statutory assignee," *Cockrill v. Abales*, 86 Fed. 505 (8th C. C. A.); *Yardley v. Clothier*, 51 Fed. 505 (3rd C. C. A.). He represents "the bank, its creditors and shareholders and not the government" (*Case v. Terrell*, 11 Wall. 199, 202), and has the right to bring suits even against directors for frauds (*Cockrill v. Abales*) without the authority of the Comptroller, "under the direction" of the Comptroller meaning merely subject to interference. *Turner v. Richardson*, 180 U. S. 87. While neither Comptroller nor receiver can make conveyance without the order of court, still the signature of a receiver to a conveyance might carry some presump-

tions, whereas the Comptroller's would be vain on its face.

Thus the estate is in the receiver, a permanent officer, freed from the frequent changes in the Comptroller's office, which has many other governmental functions.

The Comptroller, for his part, has certain active duties in the estate. All moneys that the receiver collects must be transmitted to the Comptroller for distribution (R. S. 5234), and while the receiver can bring suits generally, he can bring none against stockholders without express direction. (*Kennedy v. Gibson supra*, *Bank v. Kennedy*, 84 U. S. 19). So, while the Comptroller cannot be said to represent the estate and the creditors in the sense that the receiver does, his connection with the properties is such that his right to purchase one of them for his own use would be intolerable.

But the receiver, being only "the instrument of the Comptroller," his appointment and removal without notice, the passing upon his accounts without opportunity of objection by interested parties, leaves it equally intolerable that the Comptroller should be permitted to allow his employee to do what he dare not do himself. Indeed, the receiver stands to the Comptroller very much as the bookkeeper J. B. Hill stood to Baker. Suppose a case. Suppose Hill had bought upon his own account from Baker some of these properties, nobody would think it right that he should be buying trust assets and it would be a poor defense if he should say that Baker

ought to have known that he, Hill, was the real purchaser, that Baker was negligent, etc. The reply would be, you were in the employment of the estate. You should either have bought nothing or have notified the creditors.

Another illustration. Suppose the receiver of a national bank in New York should blandly report to a comptroller. "I have today bought from the estate on my own account \$500,000. par value St. Paul preferred at the enclosed price which I deem quite fair," and that the comptroller himself should write back express approval. Every court in the country would call it a gross violation of duty by both.

Our opponents are in a still less defensible position, since there was no confession by Baker even to the Comptroller, of saying that the Comptroller could give away the rights of creditors by mere inattention, by failing to suspect or by his clerk's pigeon-holing a confession. As for the creditors themselves, nobody will say they ought to have cognizance of accounts filed without notice in so distant and general an office.

But, it may be asked, How are these receivers to get good title when they buy from estates? First, let them buy nothing from the estates at all. Second, if they do, they can send out a postal card to everybody connected with the estate, announcing the exceptional thing of buying from their own trust, which mailing is done in judicial receiver-ships and in bankruptcy every day. However, we

think that, from the multiplicity of cestuis in bank receiverships, any asset—purchase at all by the receiver should be held not merely voidable but absolutely void. Public policy requires some such rule, the *cestuis que trustent* being so numerous that all expect some one else to do the work of vigilance and none with the keen interest of heirs or legatees. Nor is there any hearing upon accounts. The very behavior of Eckles in appointing as receiver a large debtor like Baker, and holding him there nearly three years against the protests of depositors and stockholders, affords food for reflection.

And so it is very clear that Baker must account directly to the cestuis to whose estate he was fiduciary and out of whose funds he received years of salary.

Accordingly, the only reason why we alleged that the Comptroller had no notice of this transaction of Baker was to increase the proofs of his secrecy. While we would not have been bound by anything he would have filed with a fellow fiduciary in so distant an office, we alleged his failure to file avowal even there, because that increased the proofs of his secrecy.

LACHES (b). *Our Opponent's Second Mistake.*

The whole defense here is not that we were informed of his act by a trust officer, but that we ought to have found out. Nobody was told, some-

body should have discovered. The answer itself avers nothing stronger. Baker on the stand did not so much as claim that he reported either an interest in '97 or a secret repurchase in '99. Nay more, admitting that he has owned this asset for fourteen years and always in some other name than his own, he contends that we ought to have found it out in spite of him.

Utterly ignoring the distinction between fiduciary and non-fiduciary relations, our opponents filed in the lower court a brief in which the obligation of a fiduciary to advise, and promptly advise, his cestuis of his trafficking in trust funds is nowhere mentioned, citing such cases as *Hardt v. Heidweyer* and *Wood v. Carpenter*. They quote emphatically from these without noticing that each of them, as well as all cases that rely on them, are pursuits of debtors' property by creditors into or through third persons or in other situations where nobody involved held a fiduciary relation to plaintiff or had any obligation to candor.

When they did cite fiduciary cases, they left out the most critical thing mentioned in them; they omit a fact in each *distinctly pointed out by the court*, that the defendant trustee had openly avowed his act, and that the laches discussed was not laches *to* discover, but laches *after* discovery.

For example, *Hammond v. Hopkins*, 143 U. S. 224. The court carefully says (p. 261) that the deeds by which the trustees purchased through one Chapman *showed* that they were intended for the

trustees themselves and were not false, and more, “*that the purchase was openly announced in the family,*” and that this openness was a distinguishing feature in that case was pointed out in the later case of *McIntire v. Pryor*, 173 U. S. 38, (which our opponents did not cite) where the court says:

“*Hammond v. Hopkins*, a leading case in this country, is not to the contrary. The transaction was *open and known* to all the cestuis and was objected to by none of them.”

And so in *Patterson v. Hewitt*, 195 U. S. 309. The court on page 320 specifically notes the “open refusal” of the trustee to recognize plaintiff’s right, and that the delay discussed is eight years’ delay *after this refusal*, the court saying on page 321:

“The refusal of Hewitt to execute the deed of which both the appellants had notice was a distinct repudiation of the trust and opened the door to the defense of laches * * * As there was no evidence that defendant had fraudulently concealed the facts and abundant proof that the facts were known”.

And the lower court here drew our opponents attention to the fact that the Supreme Court in *Robertson v. Chapman*, 152. U. S. 673, did on page 683 point out that the defendant agent “did not intend to conceal * * * he notified the defendant”. In *Haywood v. Bank*, 96 U. S. 611, the Supreme Court distinctly says (p. 616) of the plaintiff complaining of a sale that ‘he was promptly advised of it and of the amount realized.’”

Again, *Badger v. Badger*, 2 Wallace 87, at p. 93: "The whole transaction was public and well known to the widow and heirs and their guardians."

Hoyt v. Latham, 143 U. S. 533. One Barney, a trustee, having purchased for himself, the court notes (p. 569):

"There is absolutely nothing tending to show fraud or bad faith. * * * Barney * * * gave them apparently a satisfactory statement of the facts, requesting only that a decision be made at once."

Again, *Felix v. Patrick*, 145 U. S. 317. In that case there was no fiduciary relation at all. Land scrip of an Indian woman had been stolen, apparently, and with its powers of attorney turned over by some third person to the defendant Patrick. The court notes (p. 329) that there was no previous relation between Patrick and the Indian woman and that the relation between them was not fiduciary, but that his interest was "antagonistic" to hers from the start.

"He did not take them under an express trust to hold them for her benefit, in which case lapse of time would be immaterial, but under an implied or constructive trust."

The implied trust being that of a meddler's misappropriation the court finds that a person in her situation must of course be held to diligence. Moreover, it especially notices that the very complaint negatives its own allegations of concealment, as to which "no acts of his are averred in the bill, and we are left to infer that his conceal-

ment was that of mere silence, which is not enough. Indeed, his concealment is to a certain extent negatived by the fact that he put the power of attorney and deed upon record." (p. 331).

Norris v. Hagen, 173 U. S. 386, a fiduciary case in which the court again draws attention to actual knowledge.

"The statement that the complainant had only come to a knowledge of the alleged fraud within a short time before the filing of the bill was shown by the statement in the bill itself to be false and that he had known of the alleged fraud fifteen years."

So in *Nash v. Ingalls*, 101 Fed. 645, at p. 648:

"But here a distinct violation of the trust is alleged to have occurred as early as the beginning of 1878 and this is the ground of the suit. The injury occurred at that time and the cause of action immediately arose."

The violation there was refusal to pay plaintiff himself car rents under a trust agreement. So the court notes that plaintiff showed he had knowledge in 1878 and had waited after knowledge eighteen years before suit. Why do our opponents cite these cases? They are all cases of *actual* knowledge in the complainant.

For, the distinction is obvious in fiduciary cases when there is no actual notice in complainant. A member of this court had to apply it in *Sternfels v. Watson*, 139 Fed. 505. There a trustee violated his trust by making a mortgage. There was a foreclosure

ure sale and repeated purchases and transfers, all publicly recorded, including the wrongful mortgage itself. Laches being invoked after eight years because of these records, the court said:

“As to the defense of laches, it is sufficient to say that the trust was an express one, was never repudiated or denied by T. J. Watson otherwise than *constructively* by his mortgage on the property, and nothing came to the notice of Sternfels or Lake to show that the trust was denied or that others claimed to hold the property adversely. The law applicable to such a state of facts is expressed in *Speidel v. Henrici*, 120 U. S. 377.”

This would answer our opponents even if a transfer to Baker in his own name had been of public record. We do not have to search the records, and we assume no constructive notice. He, on the other hand, has the duty to inform us, for the whole policy of the law is against his trafficking in trust assets. But the unreasonableness of our opponents' position is all the greater because there was never anything in Baker's name. *The Sternfels case is clearly right under Townsend v. Vanderwerker*, 160 U. S. 171. (*supra*, 60).

As to notice of public records, the broad distinction between non-fiduciary and fiduciary cases will be found in the exhaustive note to 22 L. R. A. (N. S.) p. 215.

Our opponents seem to think that the very sale in '97 to Simpson should start laches running against us, though it was apparently an honest sale of trust assets and more calculated to lull us asleep than to invite attack. This sort of reasoning is well

answered by Judge Lurton in the 6th Circuit Court of Appeals, *Newman v. Schwerin*, 109 Fed. 942. S., under a written agreement with plaintiff, had a right to buy at judicial sale and hold part in trust for plaintiff. The sale did occur but S. had a corporation, in which he owned only a portion of the stock, buy instead of himself, concealing that he had the stock interest. Plaintiff taking her share of the proceeds of the sale, S. argued that when she attacked it a year or more later, she should be estopped for not having investigated the sale. "She knew there was a sale." (Our appellants' argument here). But the court felt that this sale would itself lull her asleep:

"She had, therefore, a right to suppose that the trust agreement between herself and Schwerin had become null and void by the purchase of the property by a third person. * * * It was Schwerin's duty to execute the trust according to its terms. If he bought the property for himself or had it bought in pursuance of a personal agreement which would defeat Mrs. Newman's plans for the preservation of her interests, it was his duty to have fully advised plaintiff, and *she was under no duty* under the circumstances to inquire before acting upon the truth of the assumptions of the decree of distribution. 2 Perry, Trusts, §§ 850, 851."

So in a fiduciary case the Supreme Court in *Kilbourn v. Sunderland*, 130 U. S. 505, says in reference to facts showing apparent delays of complainants after suspicious facts, that the complainants

"Reposing confidence in their agents, they may have neglected availing themselves of some

source of knowledge that they might have sought. The defendants cannot be allowed to say that complainants ought to have suspected them and are chargeable with what they might have found out upon inquiry aroused by such suspicion."

A scandalous doctrine indeed if a fiduciary should thus be permitted to conceal from his beneficiaries their cause of action while at the same time reckoning time against them, and put himself in a position to claim that he bought for himself by the very evidence that he had sold to another.

So our opponents, we say, have based their whole argument on the principles used by courts in non-fiduciary cases as to the complaining parties being put to diligence upon suspicion. Yet the very reason in such decisions shows that the Supreme Court never would apply it to a fiduciary instance. What is that language in the non-fiduciary cases like *Wood v. Carpenter*? That plaintiff should most particularly state, not only *when* he got the knowledge but how he got it. And why? So that the court can determine whether he could have learned sooner. Could have? This would impose a duty to investigate and act upon suspicion instead of the fiduciary's duty to inform. It would be utterly at war with the fiduciary doctrine. So of another reason for the non-fiduciary rule. "It is easy for you" to show when you got knowledge and "difficult for us." But it is not difficult for a defendant fiduciary to show the affirmative. That is part of his fundamental duty. He ought not to demand that plaintiffs show him when he per-

formed his own duty. (*Infra* "Burden of Proof in Laches.")

These are the errors which counsel have got into by quoting creditors' suits like *Wood v. Carpenter*. The Supreme Court never would follow such a rule, never has followed such a rule, in fiduciary cases. Moreover, they have twice criticised *Wood v. Carpenter*. In *Rosenthal v. Walker*, 111 U. S. 185, distinct criticism was thrown on that case, adverting to the fact that it had overlooked the former decision of *Bailey v. Glover*, (21 Wallace 342). Very shortly afterwards (in *Traer v. Clews*, 115 U. S. 528), the court again commented on this error in *Wood v. Carpenter*, and has made it very plain that even in creditors' suits, it is not necessary to state *how* you came by your knowledge.

Is a fiduciary to take a trust asset in secret and then debate whether this straw or that should be reckoned knowledge in those he is trying to deceive? Imagine the plight of beneficiaries. They must promptly attack him on every trifling suspicion or be forever estopped. Surely they run such risks. But the law would not make it incumbent on beneficiaries to work inharmoniously and suspiciously with their own trustee. Let him avow and the thing is simple.

In *Pence v. Langdon*, 99 U. S. 578, one Langdon in Minnesota bought stock in San Francisco through Pence. The fiduciary relation is made clear by the Supreme Court, which says (p. 580):

“Properly construed we think the letters show clearly the agency of Pence as claimed by Langdon.”

Though the delay was only one year, it was as important as twenty in a case like the present, for the subject was fluctuating mining shares sold by the agent to the principal. Every day in rescinding would be important, a year long indeed. Upon whom, then, rested the burden of proving that the principal had notice and when he got it? Our opponents, applying language from non-fiduciary cases, would say, “It is easy for you to say when you first learned, and difficult for me,” etc. This was not the reasoning of the Supreme Court, which said:

“The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant.” (p. 582).

Yet this is exactly the same set of judges (for the cases were only a year or two apart) which decided the non-fiduciary case of *Wood v. Carpenter*. The latter case does not cite the *Pence* case, and there was no reason why it should.

And some time before the latter the Supreme Court had held the same in a case where years had passed and both parties were dead. *Seymour v. Freer*, 8 Wall. 202. One Freer under written contract became Seymour’s agent to purchase lands, the title going to Seymour, who was to have five years to make the sales before dividing. “To this extent Seymour was the trustee and Freer

the cestui." More than five years passed, the property was not divided, and Seymour died. The court had to consider three hypotheses as to what, if either of the parties were living, would have been testified to:

"The devisees [of the trustee, Seymour] might have held the property and denied that under the circumstances the trust subsisted any longer. If Freer acquiesced his rights would have been at an end.

~~Pence~~ might also have expressly or tacitly abandoned his claim. This would have worked the same result. * * *.

* * * "Both parties might have concluded to continue their existing relations and to wait for a more auspicious period. * * *

"*The burden of proof as to the two former rests upon the appellants*" [the devisees of Seymour, the trustee]."

So in *Bacon v. Rives*, 106 U. S. 99, which was a demurrer to a bill alleging investments by decedent twelve years before as plaintiff's agent, the court says on page 106:

"*We cannot upon the case made by the bill fix the date.* * * * Being called upon to execute what consistently with the facts as disclosed in the bill appears to be a subsisting trust, or if it had been in whole or in part executed, to disclose when and how it was so executed, he should not be permitted to take shelter behind a demurrer which relies simply upon the statutory limitations and confesses that he has kept his *cestuis que trustent* in ignorance of what it was his duty to communicate."

The policy of the law is not to make cestuis suspicious of their fiduciaries or to provoke dissensions and petty lawsuits among them upon dubious circumstances which the cestuis must either act upon or be forever shut out by, but to put upon the fiduciary a simple obligation to speak out.

Courts excuse beneficiaries from acting upon suspicions. Thus, in *Krohn v. Williamson*, 62 Fed. 869, Judge Taft says (p. 876):

“It is quite true that Krohn suspected he was not being fairly dealt with * * * but I do not see that Krohn’s suspicions of Nelson’s fair dealing and a settlement based on them at all relieved Nelson of the duty to disclose everything. It did not put the parties at arm’s length. The trust relation continued.”

And in the famous case of *Michoud v. Girod* (ante p. 39), the court mentions on page 560 *the suspicions which the heirs entertained* of the executors. During these very suspicions they made settlements with the executors, whose frauds, nevertheless, they were allowed to overturn after 30 years. It clearly holds that a beneficiary suspecting has indeed the right, but is not under the necessity, to sue.

Nor was the *Michoud* case stronger than *Oliver v. Piatt*, 3 Howard 333, a case of ingenious fraud by the trustees. The court on page 411 says:

“There may have been unjustifiable sales and gross inattention on the part of some of the proprietors, but as against persons cognizant of the trust it can furnish no ground for any denial of the relief which the case otherwise requires.”

And in *Townsend v. Vanderwerker*, 160 U. S. 171, a delay of nine years was sustained. Though it was proved that a deed of trust had been put of record by the trustees, showing (as in *Sternfels v. Watson*, *supra*) dealings with the property inconsistent with his obligation, the beneficiaries were excused from vigilance concerning the public record.

And so in *Pence v. Langdon*, *supra*. Pence in commenting on the mining shares he had sold to Langdon, used language which he contended ought to have put upon Langdon the duty of investigation. The claim was that Pence the agent in San Francisco had sold Langdon in Minnesota his (Pence's) own shares and concealed that fact. Now Pence used these words in one of his letters, "after the 7500 shares of stock I sold you," but the lower court's comment on this (which the Supreme Court said (p. 581) was "exactly right,") was that Langdon "might, in view of previous friendly relations, have no suspicions of bad faith and might naturally regard expressions as inaccurately used rather than put upon them a construction which would show bad faith on the part of the defendant."

That we should be investigating our own fiduciary instead of his confessing is part of a theory of our acquiescing. If acquiescence, then, be their claim, the burden of proof in that also is upon them. *Pence v. Langdon*, *supra*; *Seymour v. Freer*, *supra*; *Miles v. Wheeler*, 43 Ills. 123; *Cooley v. Gilliam*, 102 Pac. 1090 (Kas.); *French v. Wood-*

ruff, 54 Pac. 1015 (Fla.); *Freeland v. Wyman*, 119 S. W. 560 (Mo. 1909); *Japhet v. Pullen*, 133 S. W. 441 (Tex.); *Faust v. Hosford*, 93 N. W. 58 (Iowa); *Fitzgerald v. Fitzgerald Co.*, 62 N. W. 899 (Neb.); *Anderson v. Northrop*, 12 So. 318 (Fla.).

Moreover, since the Federal Courts in applying laches to land suits often compare rules under statutes of limitation, and the interpretation of local statute, it is proper to note *Stearns v. Hochbrunn*, 24 Wash. 206, where in a suit against an agent's fraud it is held sufficient to allege when the fraud was discovered "without negating the idea that it could have been discovered sooner."

And as to the burden of proof, the same court has just held:

"The burden is on the agent to show that the principal had knowledge * * * and that having such knowledge he consented." *Hay v. Long*, 78 Wash., March 25, 1914.

Nor is the mere fact that a date may be uncertain sufficient to transfer the burden. *Bacon v. Rives supra*. And in the leading case of *Oliver v. Piatt*, 3 Howard at page 411, the court says:

"At what particular period the subsequent rights of Baum, Oliver and Williams first became known to the plaintiff or the other proprietors of the Piatt and Port Lawrence Companies having the same interest, *does not distinctly appear*, but the facts could not have been fully known or understood until within a few years before the filing of the bill and at most probably not exceeding eight or ten. That period, upon admitted princi-

ples, is far too short to interpose any positive bar to relief in equity.”

LACHES (c). *The Rules of Express Trusts Apply Here.*

A national bank receiver is not like the ordinary receiver or like a director in a corporation or guardian or agent, all of whom have control without title. This receiver has according to the Supreme Court “the title to the property” and is often referred to as a “statutory assignee.” (ante p. 45). His duties are expressly regulated by statute, R. S. 5234, and in conjunction with the title make him clearly an express trustee.

His fiduciary character is of course most obvious. In purchasing any of the property he would be either wholly excluded or judged by the severest rule. Wrongdoing of that sort is forbidden to “every kind of fiduciary relation. The principle is the same in all of them. Assignees of bankrupts’ or insolvents’ estates are subject to the same rule, whether appointed by courts and by operation of law, or by voluntary assignment.”
1 Perry Trusts, §209.

Even where a receiver has no title, it is the same:

“Doescher as receiver was not strictly a trustee because the legal title was not vested in him as receiver, yet occupied a fiduciary relation * * * and the equitable doctrine of trusts was applicable

to him." *Donohue v. Quackenbush*, Minn. ,77 N. W. 430.

Probably no officers have so many opportunities to filch as receivers of national banks. The assets are peculiarly liquid and mutable. Their acts are not subject to approval nor are their accounts submitted to creditors.

As to laches invoked by express trustees, the following doctrine is universally approved:

"Time begins to run against a trust as soon as it is *openly disavowed* by the trustee, as insisting upon an adverse right and interest which is clearly and *unequivocally made known* to the *cestui que trust*." *Speidel v. Henrici*, 120 U. S. 377."

Nor could Baker here improve his position by saying that when he purchased trust property he converted himself into a constructive trustee.

"In the case of an implied or constructive trust, *unless there has been a fraudulent concealment of the cause of action*, lapse of time is as complete a bar in equity as in law." *Speidel v. Henrici*, *supra*.

The language we have underlined is an exception always enforced. If it were not enforced, fiduciary trustees would gain an advantage over their beneficiaries without their consent, and as they are not permitted to gain any pecuniary advantage without such consent they will not be allowed to improve their legal relation either.

Thus in *Newman v. Schwerin*, 109 Fed. *supra*, Judge Lurton was not at the pains to decide whether Schwerin had converted himself into a

constructive, or remained an express, trustee. The result was the same. He had not informed his beneficiary and she was under no obligation to investigate.

When, therefore, we hear more liberal doctrines occasionally mentioned of constructive trustees, the latter are persons who became constructive trustees without previous fiduciary relation, or else express trustees who have openly announced their purchase. In the latter instance they remain constructive trustees during a period allowed the other side to object to the act. It is only fair to call them such then, because whatever they are doing is not concealed. But the express trustee who conceals is trying to get the advantage of doctrines applicable to constructive trustees, while so far as his beneficiaries can see, he has not changed his relation of express trustee. Of course there are many kinds of constructive trustees, and some of these are not fiduciary at all; so cases upon this point have to be scrutinized somewhat.

As Perry says of them, 1 *Perry Trusts*, §167:

“The courts are agreed in administering the same remedies in certain classes of frauds as are administered in fraudulent purchases of trusts, and as courts and the profession have agreed in calling such frauds constructive trusts, there can be no misapprehension in continuing the same phraseology.”

And again in §195:

“The trustee must not deal with the property for his own benefit; so where the trustee in selling

property to a third person stipulates that the buyer is to sell it afterwards to the trustee, and the agreement is carried out, the trustees still holds as trustee and not by independent title. * * * The trustee must clear the transaction of every shadow of suspicion."

Until the fiduciary does his part, inform and avow the purchase, laches is really not in the case. Notice the felicitous way of expressing it in *Patterson v. Hewitt*, 195 U. S. 310: "The refusal * * was a distinct repudiation of the trust * * which opened the door to the defense of laches."

Until repudiation avowed there was no laches to discuss. Perhaps this idea may be clearer by our saying that *it takes two parties to make a sale by a trustee to himself*, the trustee *and* the beneficiaries. Their acquiescence is just as necessary as his signature and until knowledge is brought home to them there is no sale or acquiescence to discuss. From very extraordinary delays, forty to fifty years in some cases, acquiescence has been presumed, but Judge Putnam, recognizing this, was of opinion that "fifteen years" was much too short for that. *Wood v. Perkins*, 57 Fed. at 261.

LACHES (d). *Rule in "Actual Fraud Proved."*

Laches is for the most part used by courts in doubtful cases. Against proved fraud it is only a bar where the notoriety of avowal is too great to be ignored, and *in addition* defendant has spent time

and money upon the property, not in secret, but *openly on the faith* of such notoriety.

By “proved” we do not merely mean “found against” by the lower court but proved by facts which any court would say must remain unchanged by any probable proof; and when against proved fraud the court considers laches at all, it adopts a rule so liberal as practically to do away with laches. The Supreme Court itself avows this distinction.

For laches is a policy, *first*, to compensate for loss of evidence; *second*, to protect improvements made or sums spent in the belief that the other parties have abandoned their claims. But when a defendant, as here, confesses fraud and yet invokes laches, the court says: Is it you that complain of lost witnesses? Absurd! It is plaintiff whose case has been made harder by that, for you have admitted the wrongdoing. You have had nothing to lose in witnesses. Their death, if anything, has been of value to you, who confess. Or is it mere lapse of time that you complain of? This was valuable rather than disadvantageous to you. It might have enabled you to escape. You almost did escape. Now that you have confessed, it is the true owners who have been damaged by delay, not you. But you complain that you have spent money or put improvements on the property. Well, was this done while you were hiding your title? If so, you were then hiding the right of the other people to sue you, and presumptively they would have sued you, a fiduciary, if you had

avowed. You shall not improve people out of their property without their knowledge. Or possibly you complain that the property has increased in value? Has it so increased since you avowed ownership or while you concealed ownership? If you had been an honest man, you would never have had this property at all, or if you had not taken great pains to conceal your dishonesty, the other people presumptively would have taken it away from you before it got all this value that you talk about.

The object of judicial inquiry is the ascertainment of truth. When truth is confessed or overwhelmingly proved by facts obviously not affected by time, rules intended to protect defendants in cases of doubt must give way.

So in *McIntire v. Pryor*, 173 U. S. 38, the court says (p. 54):

“We have no desire to qualify in any way the long line of cases in this court, too numerous even for citation, in which we have held that where the fraud is constructive, or is proved by no conclusive testimony, or by evidence falling short of conviction, and the property is greatly increased in value, great diligence will be required in the assertion of plaintiff’s rights. But these were all cases either of bills to establish a trust or open settled accounts, bills not involving fraud or where the fraud was not clearly proved, or where with knowledge of the facts the fraud had been deliberately acquiesced in, bills to impeach judicial proceedings, or where property had passed into the hands of persons innocent of fraud or with no actual notice that a fraud had been committed.

“Granting all that may be fairly claimed in these cases, there is another class having a different bearing, in which it has been held that in cases of *actual fraud*, a delay even greater than that permitted by the statute of limitations was not fatal to the plaintiff’s claim. The leading case is that of *Michoud v. Girod*, 4 Howard 503, which was a case of actual fraud committed by trustees of real estate against their *cestui que* trust. A bill filed 36 years after the commission of the fraud was held not to have been too late.”

The *Michoud* case is very famous. A third person bought at a fairly conducted judicial sale. Later the executors repurchased. It was held that the price paid by the purchaser was nominal. Thirty-six years passed, during which sales of part (525) of the property were had. Toward the last the executors even went into possession (525) and the suit was brought against *their heirs!* Receipts and acquittances had been given by the heirs, and it was conceded that they had long been suspicious. The detailed facts preceding the opinion are most interesting, and the opinion of the court was decisive, notwithstanding some difficulties in accounting. It was said:

“*In a case of actual fraud*, we believe no case can be found in the books in which a court of equity has refused to grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known.” (also *supra*, 39).

In the *McIntire* case the fraud was upon an ignorant person, but what will be said of *Saxlehner v. Eisner Co.*, 179 U. S. 19. There the court was met

with laches as to two features claimed to be infringed in a patent suit. One was the use of the word "Hunyadi." As to that they held Saxlehner barred by twenty-five years' acquiescence in an apparently general appropriation of the name. The other question was on the use of a label. Now Saxlehner, a man of large business affairs in Hungary, was accustomed to watch his rights in various countries. It was on this very account that he was defeated as to the word "Hunyadi," and even as to the label, the court conceded it had been "ten years" in use in the United States, but says:

"But in cases of actual fraud, as we have repeatedly held, notably in the recent case of McIntire v. Pryor, 173 U. S. 38, the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishing principle, that where actual fraud is proved, the court will look with much indulgence upon circumstances tending to excuse the plaintiff from a prompt assertion of his rights. In the case of an active and continuing fraud like this, we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence."

In *Hammond v. Hopkins*, the fiduciary case discussed supra in which, as we have noted, the court protected the trustee because he had "openly announced in the family" his purchase and thus started laches, the court did not dissent from the doctrines of *Michoud v. Girod*, but distinguishing it said, "but there was actual fraud in that case."

And so Judge McPherson, in *Stanwood v. Wishard*, 134 Fed. 959, citing the *Michoud* case, and declining to apply in a fiduciary instance the doctrine of the creditors case of *Wood v. Carpenter*, says:

“The case of *McIntire v. Pryor*, 173 U. S. 38, collects the cases that conclude all discussion that as against an actual fraud and as against one perpetrating the fraud when acting in a representative and trust capacity, the period of the statute of limitations is largely if not wholly immaterial.”

He speaks of “statute of limitations,” but the suit was in equity and the defense laches, with the usual comparative doctrines invoked from the statute.

The Turner and Rotch Testimony.

The repurchase in '99 along with its concealment is, of course, actual fraud by confession. But the fraud antedated that. The lower court here found a fraudulent understanding in '97. The presumptions were irresistible, even without Simpson's admissions to Turner and Rotch. (143, 133 and p. 29, *supra*).

A word, however, as to these. While defendant resists them, he, of course, concedes that admissions against title by one's dead grantor are an exception to the hearsay rule, and permissible because they are admissions against his interest. This is everywhere the law and clearly so in Washington (*Corbett v. Weaver*, 59 Wash. 248; 2 Wig-

more, evidence sec. 1458; *Reese v. Murnan*, 5 Wash. 573), but, says he, upon your, plaintiff's, theory, Simpson never had any real interest. It was actually Baker's and so, he argues, the rule falls with the reason for it. We do not agree that the reason falls. The reason is not so narrow. If the rule does not apply to an instance like this, then Baker can take advantage of his own wrong, putting the property in Simpson's name to hide ownership, but not to admit truth. But surely a man who puts title in another for a fraudulent purpose is estopped to deny that man's confessions. Upon theory this must be correct, for why does the law permit the admissions in an ordinary case? It is because the holder of the title is not presumed to have said anything to injure what he possessed. But is he not also presumed not to utter that which injures his character or exposes him to liability? As a man will not wish to hurt his title, so he will not wish to admit something that may expose him to civil or criminal action. When he does admit that, it is as presumptively true as an admission against title.

Now we were assuming our opponent's premises to be correct, that the admissions of Simpson were made after the secret *repurchase* of '99. But before that time, according to Baker, the property was really Simpson's. Hence on his theory, admissions in that period would be relevant. Now Turner fixes one of the conversations in 1898.

LACHES (e). *There must be changes distinctly prejudicial to defendant when he invokes laches.*

Even in the non-fiduciary case of *Galliher v. Cadwell*, 145 U. S. 368, Justice Brewer, in defining laches, did not put it upon the vulgar theory of mere lapse of time or lack of diligence, but of some equity built up in the defendant, saying:

“On the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; *that by reason of his delay the adverse party has good reason to believe that all those rights are worthless or have been abandoned*; and that because of the changed conditions or relations during this period of delay it would be an injustice to the later to permit him to now assert them.”

Observe three things: Knowledge by plaintiff, secondly *defendant's belief* that the claim is abandoned, then the changed conditions. Defendant in a word builds up no equity in himself, if, putting on his improvements, he does it under a secret ownership, believing himself not discovered. If he has any equities, it is plain he has not been relying upon them.

And in another non-fiduciary case this court said, *London & San Francisco Bank v. Dexter Horton & Co.*, 126 Fed. 601:

“No hard and fast rule has been laid down.
* * * One principle pervades all cases. * * *
Not only must there be a seemingly unnecessary delay * * * but that by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it

would be inequitable to permit the claim of plaintiff to be enforced.”

If these doctrines pertain in non-fiduciary cases, how much more vigorous must they be in the fiduciary cases, and this last we have seen in such instances as *Michoud v. Girod*.

So in *Brainerd v. Buck*, 184 U. S. 99. Plaintiff in 1879 sent money to Brainerd which was invested in land in Brainerd's name instead of plaintiff's. In 1880 plaintiff learned of this, but acquiesced because he supposed that the land would be given to his (plaintiff's) sister under a will that Brainerd had already made. After Brainerd's death in 1880, plaintiff's sister, living at a distance and supposing that she had title, conveyed her supposed ownership to plaintiff, but in 1897 the heirs of Brainerd brought ejectment against plaintiff, whose sister had not inherited at all. Then plaintiff in 1898 filed his bill to establish a trust. Here was a delay of eighteen years after Brainerd's death; but more, it was a delay with knowledge, for plaintiff knew that in 1879 Brainerd had wrongfully put the property in his own name, at the very outset. He had, accordingly, no other excuse than a belief that his own sister would inherit from Brainerd and thus square the transaction. Held not laches, because the ejectment suit was the first notice to plaintiff that the land had not been devised to his sister. But our opponents would on such a state of facts make a vigorous protest, saying that for eighteen years this man had acquiesced with

knowledge of the original wrong, tardily changing his mind when he found that his sister was not the heir. The Supreme Court, however, took a different view of his situation because there were no innocent investors and there was no reason why those who had done a wrong should not ultimately right it.

To the same effect *McIntire v. Pryor*, already cited, 173, U. S. 38. The suit was to set aside a foreclosure. There was nine years' delay after the foreclosure before suit and four years' delay after the fraud was actually discovered, but it did not appear that anybody would be prejudiced by the restoration of rights.

Similar cases are *Hudson v. Cahoon*, 91 S. W. 72 Ind., 10 years' delay; *Harvey v. Hand*, 95 N. E. 1020 Ind., 12 years' delay; *Chamberlin v. Chamberlin*, 95 Pac. 658 (Cal.), exact duration of delay uncertain; *Roush v. Griffiths*, 69 S. E. 168 (W. Va.), 14 years' delay; *Mullen v. Walton*, 39 So. (Ala.), 27 years' delay; *Wright v. Wright*, 89 N. E. 789, 40 years' delay; *Pearson v. Treadwell*, 61 N. E. 44 (Mass.), 8 years' delay; *in re Boney's Estate*, 75 Atl. 1061 (Pa.), 32 years' delay.

LACHES (f). *There Are No Prejudicial Changes Here.*

The circumstances are five which a court reckons: Improvements, deaths, innocent purchasers, difficulty of accounting, increase in value.

Improvements. None here. The land has never risen above the tide until the state's contractor filed it *during this suit*. (185). In taxes ^{and some of the taxes} only has Baker spent anything, a few thousand dollars ordered refunded. This is not a case where stockholders have made heavy investments, or where people have built homes, or where the defendant himself has squandered his life's efforts.

Deaths. In nearly a third of the cases of fraud concealed some party or other is noted as dead. In the *Saxlehner* case (ante), it was uselessly urged that Saxlehner, if alive, would admit that he had never mentioned his adverse rights, nay had refused personally to sue. In *Townsend v. Vanderwerker* (ante), a party to the agreement was dead. "Only a circumstance," says the Supreme Court, "not a controlling thing." So in the *Michoud* case conspicuously. In *Seymour v. Freer*, 8 Wallace 202 (post), both parties had long been dead. In *Bacon v. Rives*, 106 U. S. 99, the trustee had long passed away.

How idle to complain that Simpson is not alive. Baker has confessed, not indeed the original fraud of 1897, but the secret purchase of '99, itself a fraud or the worst badge of an earlier one. Would they have Simpson deny Baker's railroad letter? Baker cannot say: "I bought years after the receivership, and you are now, Simpson being dead, trying to place upon me a purchase during that receivership." No, he confesses the creation of a secret trust during that receivership.

But were Simpson alive and denying the fraud of '97, would not a court smile? "You bought the asset from Baker both below a fair market estimate and below what the receiver had lately paid? Then sold back while he was still receiver, at mere cost and interest, notwithstanding a rise in value? Agreed to carry it in secret for him when that officer was indebted to the trust itself!"

Moreover, while the defendant whimpers at the loss of Simpson, he does not call others available, Hardin, Brockett, Meacham, or give any reason, when asked, why he does not. The presumption is they would testify against him. (Ante p. 28).

Innocent Purchasers. The distribution of stock is seen at Rec. 179-180. Surely Norton will not be deemed innocent and his holding is but 3 per cent. As to the few who have received presents of one to five shares each, these are purchasers without consideration. Nor has the divorced wife chosen to interpose here, doubtless secured by the other collateral, and, it may be, deeming it well to keep out of a case in which she might have to admit cautions from Baker that the least said about this property the better. Whatever her reasons, she is compelled, like the other shareholders, to accept her stock with whatever title this company had, which cannot be superior to that of its fraudulent organizer. *Wilson Coal Co. v. U. S.*, 188 Fed. 545; *Lynn & Lane Company v. U. S.*, 196 Fed. 593, both from this court.

Difficulty of Accounting. Never was case so simple as this when we consider the accounting in *Michoud v. Girod* after twenty-nine years of suspicion and the death of one of the executors, an accounting decreed in spite of partial sales, improvements, and what not. Baker is to be handed back simply his taxes and the sums paid to the State.

Increase of Value. This is the last circumstance which equity will consider to protect a fiduciary. If this of itself barred relief to those he has wronged, he would indeed have a premium for industrious concealment. (See “Rule in Express Trusts Applies Here” and “Actual Fraud Proved.”)

No case can be found in which a court has allowed this circumstance *alone* to decide a fiduciary case. Search as you may, you will find always one of the other four “altered conditions” added to this or else “doubtful proof.” As where a court says there are innocent purchasers here *and* the property has increased, etc.; or the proof is doubtful *and*; or there are great improvements here *and*, etc.

No court has been bold enough in a fiduciary case to say: “Yes, you have defrauded these people, but the property has gone up so much in value that we shall let you keep it, though that is the only thing that has changed.”

LACHES (g). *Sundry Circumstances Relied On By Defendants as Starting Laches Here.*

The following facts are pointed to by the defense, upon their erroneous theory that it is our duty to ferret out fraud in a fiduciary:

1. *The Sale in 1897 to Simpson.* If this itself ought to start laches, then every time a trust officer sells an asset to a third person, the thing must be then attacked or subsequently discovered grounds are lost. On the face of the sale to Simpson there was nothing to indicate an interest in Baker, which is the object of the present suit. *Newman v. Schwerin*, 109 Fed. 945, is conclusive on this.

2. *The Wing Examination in 1898.* This occurring while Baker, still receiver, was an employee of the Comptroller, no laches or ratification by that superior could bind the creditors. (Ante p. 44).

But let us suppose it could. Why, say they, you were suspicious in '98! Why did you not find out, why did you not go from this person to that until you discovered the truth? The instant reply is, Why did you not tell us the truth when, according to this story, you had the chance? That was your duty. Instead of Wing's not discovering anything being a reproach to us, his attempt to find something, if he did attempt, is commendable in the then comptroller.

But see the absurdity at the start. Defendant states that there was no purchase until after 1898, that he had no interest till 1899 (besides which Simpson never transferred at all until 1905). If, then, defendant's own story be true, there was in 1898 no fraud to discover and this Wing incident is valueless to both sides; or if the fraud, as we contend, already existed, then the greatest badge of it, the repurchase, was wanting when Wing appeared. Again, if Baker already had an interest, then he violated his duty in not telling Wing about it. Baker naturally does not claim that he told Wing anything of the sort. That position he could not take because he says he had yet no interest.

Even if the creditors were bound by negligence in Baker's employer, the Comptroller, we would say that in this Wing incident there was no proof of any such negligence, for the Comptroller was endeavoring to get information, which was defeated or not supplied.

They argue that Wing ought to have discovered, not only what they say did not then exist, but what the defendant did not confess then and has since denied down to his first false answer in this case. A likelihood, indeed, that even if Wing had suspected an interest of Baker's in the Simpson purchase, he could have got the truth! Can anything else be imagined than that Simpson would have denied as vigorously as Baker has ever since denied? In *Cunningham v. Pettigrew*, 169 Fed.

335, at page 343, the 8th Circuit Court of Appeals answered a reasoning like the foregoing:

“It is said Pettigrew ought to have inquired of Cunningham, Hyde and Fox or some of them concerning the fraud, and that his failure to do so was negligence on his part. It seems to us that the unreasonableness of expecting those men, who were the perpetrators of the fraud, to voluntarily give self-inculcating evidence excused any effort to induce them to do so. Their personal interests, strongest of human motives, impelled them not to do so, and any attempt to secure from them information which would necessarily expose them to civil liability, at least, for their wrongful conduct would, in our opinion, be not only an unreasonable requirement, but one which might have thwarted any ultimate discovery. In such circumstances we cannot regard the failure to do so as fatal laches.”

Our opinion, though, is that Wing never examined, and his attention was never drawn to this particular transaction. The story rests on Baker's word alone and he gives a very meager account of what they now make important. This was no part of our case. It was theirs. Did Wing ever file a report on such a subject? If so, surely it was for them to produce it. The copies could be had for the asking. They have introduced much else of the Comptroller's files, and they did not need any deposition from that office to get this, for Revised Statutes 884 is extremely liberal about this Department's documents: (Infra also pp. 86-7).

“And all copies of papers in his office, certified by him and authenticated by the said seal, shall be in all cases evidence equally with the original.”

Moreover, in his answer, defendant Baker said nothing about an examination by any particular officer. That he was reserving, we suppose, for a surprise. Perceiving Wing not there to confront him, he selected him as a sort of ratifier out of the various contemporary officials. Observe that while Baker himself would have us believe that Wing had a direct errand about this business, nothing of that kind is sworn to by J. B. Hill, his bookkeeper (216-238), yet nobody can doubt for a moment that a person on Wing's supposed errand would have strictly interrogated the bookkeeper about what he knew of this transaction, about Simpson, about the value of the land, about the relations between Simpson and Baker. Yet not one word to this effect by Hill, Baker's witness. Indeed, Hill will not say that he even showed Wing this particular land. He speaks of showing him the "real estate that *remained unsold*" (230).

3. *Judge Frater*, Baker's first successor, it is said, ought to have found out things. Let us see. He succeeded Baker in April, '99, and remained active receiver until 1901 (168). From then until February, 1913, when Schofield was appointed and this suit begun, the receivership was dormant. Frater meanwhile had become a Superior Judge, and in 1907, eight years after Baker's resignation, he granted a divorce to Baker's wife on her complaint of desertion (defendant's Ex. X., and 212). Now, it is argued that because in this divorce some of Baker's stock in the Seattle Water Front Realty

Company, along with much other collateral, was allowed to the wife, Frater ought to have recalled the events of years before, ought to have seen through a great many things, ought to have acted upon them. He ought to have seen, it is said, not only that this company owned tide lands, but that it got them from Baker, and more, that Baker got them himself during his receivership and not after his receivership, and that these lands must have been lands that belonged to the Merchants' National Bank!

A preposterous argument fortunately not left to assumption, for Judge Frater says he never knew in the divorce case what assets the company had (167), and it is not asserted by the other side that anybody advised him. The divorce decree (Defendant's Ex. X.) is very general, the adjustment of property rights being "made between themselves" (212).

Diligence, indeed, is invoked here by one who could have settled all these questions by common frankness and honesty.

4. *Norton's Recorded Title.* It is even argued as follows: Norton at least put a conveyance of public record from the State in 1905, and Norton had been known to Judge Frater back in '99 and 1900, when Frater was an active receiver, as having done work for the bank in the East. Therefore, say they, when the deed went on record to Norton, Judge Frater should have known of this

fact among the hundred thousand instruments annually recorded in King County. Nay, more, he should not only have noticed this conveyance, but he should have recalled the Norton of years before, then have felt that Norton had dishonestly come by some property. Nothing, let it be remembered, was of record showing any connection between Baker and this property. It was not even on the public records from Simpson to Norton, only from the State to Norton. The Federal Supreme Court has disposed of the duty of notice in respect to such an instrument, even if it had been in Baker's own name. *Townsend v. Vanderwerker, supra.*

5. *The Brockett Correspondence, 1905.* We think we have shown, *ante* p. 19, that this correspondence, so far from indicating public facts to put anybody on notice, actually shows the care taken by Baker's lawyers to conceal his connection with this block.

All these clues now pointed to by our opponents as constituting in themselves notice to us lack a necessary premise. Nothing had occurred before these to make anybody look for clues or recognize a clue if he happened to see it. Baker, in other words, had never done anything in his own name. These trifles are, accordingly, as irrelevant as they might be in the following illustration: I am informed today, by a friend, we shall say, that an agent of mine some years ago cheated me in a piece of property at Spokane. I immediately

bring suit. Then the defendant blandly says to me: "Why, if you had gone to the Land Office at Spokane you might have found a letter from a lawyer of mine, in which, though he did not mention my name, he was discussing the buying of this property, and that would have set you a-thinking," etc., etc. But I reply: "Why should I have gone to the Land Office at Spokane at all? I had no reason to suspect you. You were not so much as carrying the property in your own name. You now ask me to consider something as known to me which would make me search for clews."

This Brockett correspondence, so far from furnishing argument against us, does, by its careful suppression of Baker's name, make argument against him.

(h). *Burden of Proof in Laches.*

We assume our opponents driven to the burden of proof in respect to acquiescence or laches, but they seem to confuse themselves as follows: Your bill shows knowledge as of some time before the beginning of this suit. Now, when did you get it?

Our first reply is that until he has shown repudiation, laches is not involved in this case, that it is not for him to say I will discuss the *bona fides* when you explain delay, for part of the *bona fides* is his advising us of what he did, and he is not to circumvent that duty by challenging at the outset a delay which, even had it existed for sixteen whole

years, would be innocent enough unless with knowledge. Such knowledge in us it would be his duty to establish.

But if there was any burden upon us, we thought we fully discharged that, as follows: Baker's successor, Frater, is the one who Baker will claim ought to have acted. (We assume he must say Frater rather than the Comptroller, for had he actually made a clean breast to Frater, he would be very indignant if we were to argue now that that does not help him, and that he should have advised the *Comptroller*.) Frater then, with the title and trust in him, is the one who, Baker must claim, represented the creditors for the purposes of laches. Now Judge Frater testified distinctly that he never had any intimation of Baker's interest in Block 430 (167-8), though he had had a good deal to do with Baker in the transfer of assets. This officer we think entirely purged himself of notice. Now Frater was receiver down to the appointment of Schofield, just before this suit. That leaves only Schofield's term to be accounted for. As to Schofield, we put in no testimony, for we confess knowledge during that period—about a month. If, therefore, any testimony was required from us in advance, we think we more than complied with it, and that it was shifted to Baker to show either that Frater spoke untruthfully or that some other officer, if any such were qualified to affect creditors by knowledge, received it. Yet Baker, whose duty it was affirmatively to advise

us, and who, far from advising us, confesses active concealment, would now have this court both disregard the testimony of Frater, and go the whole doubt against us who have been wronged, that is to say, assume that we have known *all* these facts *all* of sixteen years.

See also p. 127 Even were this court uncertain as to the date of knowledge acquired by us, it would not resolve doubts against us, (ante, 58 bottom, 61 bottom).

Baker, having wronged this estate both as its debtor and as its trustee, is hard indeed to please. He has done everything that equity abhors but claims the very utmost that equity has to bestow, liberty to deal in trust funds, liberty to hide them, liberty to file an untruthful answer, liberty to change it, liberty to maintain evasive insufficient and contradictory pleadings, liberty to have all doubts resolved in his favor.

And his counsel knew well that upon him devolved the burden of showing notice in us. This they set out to take the deposition of Comptroller Kane and have printed (73) an interlocutory ruling of the lower court striking out certain interrogatories propounded to him. They did *not* print those that the court permitted. Instead of taking the deposition they dropped it, though allowed to ask Mr. Kane the following, to which we made no objection: (Original Stipulation, this court).

1. State your name, residence and occupation.
2. If you reply that you are connected with the office of the Comptroller of the Currency, state

your official position and how long you have been identified with that office and the various positions you have officially occupied.

3. As such acting Comptroller are you the custodian of all the books, records and files belonging to the Comptroller's office?

4. *When were you first acquainted with the claim* which is now made by John W. Schofield as receiver as set forth in the foregoing suit?

5. Who appointed John W. Schofield as receiver of the Merchants' National Bank?

After leading us to suppose they would take the testimony they suddenly dropped it just before the trial. Similar questions were permitted to be asked also of Schofield by deposition. He appeared at the trial and testified, as the record discloses, but our opponents propounded him no questions on such heads.

(i). *The Answer Here on Laches.*

The answers proceed on the theory not of notice given by the fiduciary, but of negligence to discover. Even as to the latter they are inconsistent and evasive.

Baker's answer. (30) His paragraph XII., *answering ours of the same number:*

“Defendant denies that the purchase [by whom? *Simpson or Norton or Baker or Realty Company?*] of said tide land Block 430 and said lease was made without the knowledge of the Comp-

troller, and denies that the assignment [*to whom? from Baker to Simpson or to Norton?*] of the same was made without the knowledge of the Comptroller of the Currency, but avers that the Comptroller of the Currency had full knowledge of the situation, both in law and fact, relating to the claim of said insolvent bank to the right to purchase said land, and that all acts done and performed by this defendant pertaining to the same [*What is meant by "the same," the right to purchase, or the lands themselves, or the assignment?*] while this defendant remained receiver, were with the full knowledge of said Comptroller and were done and performed with his approval [*knowledge and approval by the Comptroller of the secret repurchase and hiding of that asset?*] * * * Denies that he individually or as receiver has performed any act contrary to equity or good conscience, but avers that all of his acts while receiver were for the sole and exclusive benefit of his trust and were performed in good faith, with the full knowledge of the officers of the United States having supervision of his trust." [*"All his acts." This was pleaded before he had shifted and had admitted by amendment the repurchase while receiver. That act he admits in his testimony, was entirely secret.*]

The Company answers as follows, after denials of concealment, etc. (70):

"But avers that plaintiff, or his predecessors in interest, knew or had means of knowing, for more than three years prior to the commencement

of this action, to-wit, since January, 1897, all the facts known to him now [*“Facts.” But he has already denied many of our facts. What, then, does he mean to say was actually known to us?*] and that plaintiff is therefore barred by the statute of limitations. (70) * * * This defendant avers that all the facts in said *bill of complaint* [not “in this answer”] set forth and all matters connected with said receivership, and all dealings with reference to said Block 430, of Seattle Tide Lands, and the harbor lease adjacent thereto, and the method of handling the same, [*Everything mentioned except “dealings” is an official act. Dealings cannot mean his own secret act, for see “advice and direction” following*] were matters known to the Comptroller of the Currency and were conducted under and pursuant to his advice and direction. [*Notice “in the complaint” also Comptroller’s “advice and direction.” Our complaint alleged no repurchase, only the original fraud.*] in addition to which the same were matters of public record, open to the world, and the same state of facts which now exist and form the basis of the allegation in said *bill of complaint* have existed at all times since the Merchants’ National Bank of Seattle was placed in the hands of a receiver, and could and would have been discovered and made known to any one investigating the same or investigating or inquiring into the doings and affairs of said receivership.” (70)

How easy to have said, had he dared, that he did put the thing in Simpson’s name for himself

at the outset and that we knew of it. He could not allege *actual* knowledge of the *original* fraud because he denies there was any. As to that secret he attempts to plead, and evasively pleads, a defense not permitted to a fiduciary still concealing, indirect or constructive knowledge on our part, knowledge presumed from suspicious facts. So much for the affairs of '97. As to the *repurchase* in '99, he alleges neither kind of knowledge.

Two things immediately strike our attention. First, *inconsistency*. Is he now allowed to say (or does he actually say), after denying there was any fraud in '97, that we knew of it and could have attacked? And this question would arise, no matter whether or not he had pleaded subsequent repurchase. Second, there is *no full and fair statement* of just what he means to say we *did* know. The answers are sham and evasive.

The inconsistencies we have pointed out above, as well as the lack of frankness and certainty, are not captiously adverted to by us. On the contrary, they are pointed to because some of them arise from the very shifting of Baker after the discovery of the railway letter, the others from a deliberate purpose not to allege anything pointedly and directly at all.

Now, if ever there was a case in which an honest man could have made a direct, positive and unvarying disclosure of his position from start to finish, it was this: As to mere amounts paid he might differ, as to a month here or there he might

differ, but as to his positively informing us, he would not be in doubt, and he would not be saying also that a thing had never been held in trust when in point of fact it had been held six years at least in trust.

Such answers as these are not tolerated in a court of equity. The following authorities will suffice:

Newman v. Schwerin, 109 Fed. 942, which we have used several times in this case, is again in point. There the purchasing company, in which the trustee had a secret interest, set up rights as an innocent purchaser. It relied on language set out on page 945 in detail by Judge Lurton, in his statement of the facts. That language is fully as definite as any employed by the defendants in this case. It was "that complainants Newman and wife were advised immediately after the sale of the fact that said lands had not been purchased by defendant Morris Schwerin, but by the Central Land & Coal Company. They also knew and insisted at that time that said defendant was interested in the Central Land & Coal Company," etc. But the court was not satisfied with this and says:

"The defense of innocent purchasers for value and in good faith is a defense which must be explicitly made by plea or answer. Notice should be denied in the fullest and clearest manner. Pom. Eq. Jur. 784, 785; *High v. Batte*, 10 Yerg. 335; *Smitheal v. Gray*, 1 Humph. 491; 34 Am. Dec. 34,664; *Harris v. Smith*, 98 Tenn. 294, 39 S. W. 343; *Boone v. Chiles*, 10 Peters 176. The answer of the Central Land & Coal Company contains no

such defense. The references in the answer of that company to the contract between Messrs. Newman and Morris Schwerin are indefinite and evasive. *Notice of that agreement should have been denied in the fullest and clearest manner, as well as of all circumstances referred to in the bill from which notice might be inferred, and the answer should include all those particulars which are necessary to constitute a bona fide purchaser.* Pom. Eq. Jur. §785. The answer is grossly defective in all that is necessary for the proper making of such a defense.”

Several things are noticeable about the answers here. First, the different defendants do not plead the same things. Second, they contradict each other, because when amendments were making at the trial, some paragraphs were left unamended, defendants leaving themselves in a position to claim two theories of defense. Third, they all omit allegations of notice given and rely only on “that knowledge could have been acquired.” Fourth, they leave us uncertain as to which transaction this knowledge could have been acquired, whether of the original fraud as alleged by us or of the repurchase as alleged by them.

The untruthfulness of the answers on the facts of purchase and secret trust. See pp.2 *et seq.*, *supra*.

“NO POWER TO ACQUIRE BLOCK 430.”

We have not yet seen our opponent’s brief, but in the lower court they argued as follows: The bank and its receiver had no right to contract with

the State for these tide lands. The whole transaction was so *ultra vires* that even if Baker dealt fraudulently against his trust, he should be permitted to keep them.

The court surely will not take kindly to this mode of escape. It was Baker himself who advised the Comptroller, not only that he had this right of purchase, but that it was "a valuable asset" (98). Upon this recommendation trust money went into the purchase and Baker is today, through his company, owner of a trust asset.

If the objection is argued by our opponents on the ground that it is a contract rather than a purchase and that the contract obligated the receiver to do something that might survive his receivership, the objection is but academical because, as the original contract shows (bottom of 107), it is assignable, and so assignable that if the State accepts assignment, it permits a novation just as we see that in the assignment actually made (108-9) Simpson, when he succeeded to this contract, covenanted actively to keep its conditions. Baker even in recommending the contract to the Comptroller mentioned the assignability, and the Comptroller in ratifying the contract had said:

"Inasmuch as the contracts are assignable, they can no doubt be disposed of to advantage at any time should such a course seem advisable." (99)

So, it is not worth while to argue what the legal status is of a contract by a receiver which, let

us suppose, would obligate him to build a ten-story house and put on one story every year, a contract obligating him to a long course of disbursement without relief or substitution. Whatever may be thought of an engagement like that, it affords no illustration of the one under consideration.

For not only was this contract assignable in terms with relief from obligation, but the testimony shows that the contract would have value like a deed without regard to the balance due upon it. Whether, then, it be considered as either the making of a contract or the purchase of land, it was something for all practical purposes without permanent obligation. It could be resold the next day.

We have said before that ownership of tide lands under contracts long before State patent is earned, is a property right of great value in Washington. It carries with it immediate possession, and in this particular instance this land, from the day that Baker bought it by contract, rose steadily in value.

However, the argument of our opponents seemed to be directed not so much against contract as against land purchase. The thing was void, they argue, not so much because of its liabilities, but because it was something which he could not hold.

Now, why not hold? If they argue that it was outside his trust to buy real estate, then they must admit that if he had a piece of property surrounded by property which he did not own and through which it was of vital importance to get a right of

way, he would have no right to buy such right of way. Innumerable must be the occasions on which business prudence in a receivership will require the buying of some additional piece of property. The receiver of arid lands might thus be unable to buy lands adjoining containing springs. It is a question of discretion, a question to be settled "under the direction of the Comptroller" (R. S. 5234).

To us it seems plain that the very nature of a tide land preference right makes its own argument here. One has upland property. Between that upland and the sea lies other property. The upland property is made very much more valuable if you acquire the lower. Would you have a right to abandon it and not make anything out of it, even aside from the value given to the upland by the frontage? *Our argument is that this was an occasion when the receiver had to decide not whether he would acquire, but whether he would abandon, an asset.* Not to have entered into the contract with the State would have been for this trust practically to have given away a valuable piece of property. There is no other way to look at it. The prices paid to the State were purely nominal.

Is it argued, then, that it was the business of the Comptroller and this receiver to give away assets, when by paying a paltry \$148.00, the one-tenth, they got a piece of property immediately of much greater value and ever afterwards rising in value, valuable in addition to the increased value which it gave to the upland behind it?

The expenditure in buying this asset was the prevention of waste. It was like a receiver's putting repairs on a piece of property or paying up arrears of taxes on dubious lands. We have no hesitation in saying that the Department and Baker would have been extremely reprehensible if, for want of a payment of \$148.00 on these twelve acres of tide lands, they had suffered that right to pass away.

Cases are cited by our opponents under this head that seem to us to have no application. One, of which they seem disposed to make much, is *Case, Receiver, v. Kelly*, 133 U. S. 21, immediately distinguishable and yet the only one cited with any bearing on the present. Officers of a railroad had certain lands given to them, with the intention that they be turned over to the railway company later, the road being then in construction. They kept the lands. The company never had title to them, and it was proved, as a matter of law, that the company never could have taken title to them. Moreover, not one dollar of the railroad company's money ever went into those lands. This distinction alone eliminates the citation. Not for one moment would the Supreme Court have held that if the company had put some of its own funds into those lands, the officers could have appropriated them. Thus in the substantial elements of trust and fraud, an element was lacking there which is present here, and in the purely legal and technical aspect, another element is here which was not there. This element was that in that case the title never had been in the railroad.

It never had gotten further than the names of the officers who were expected to turn it over to the railroad.

Here the contract was not only paid for in trust funds ("admits that the said amount was paid from the funds in his hands as receiver," 23), but was taken *in the name* of the Merchants' National Bank. (104) In the case cited the court was asked to propel the property forward into a company which had no legal right to acquire it and which had spent nothing to get it. Here the court is asked to let a trust officer keep a piece of property which his trust paid for and which he has gotten away from it.

And the general principles of estoppel apply against Baker here.

"A trustee cannot be heard to say, 'I will not carry out the trust because the parties had no legal right to repose the trust in me.'" *Cowan v. Hearst*, 83 N. W. 274 Mich.

"A trustee is estopped to question the legality of the contract by which he acquires property when called to an account by the cestui que trust." *McMicken v. Perrin*, 59 U. S. 507.

"Where a national bank, though restricted by statute not to acquire real estate, does acquire it, it is good against everybody except the government." *Union National Bank v. Matthews v. Matthews*, 98 U. S. 621.

"So when a loan is made by a national bank in violation of the statute, it is only the government that can question it." *Bank of Lowell v. Butler*, 323 N. E. 909.

“The purchase of stock for speculative purposes by a national bank clearly in contravention of its charter is good against everybody except the government.” 172 Fed. 846.

“And generally the doing of acts prohibited by the national banking act is, when done by them, good nevertheless until attacked by the government itself.” *Thompson v. St. Nicholas National Bank*, 146 U. S. 240.

Barron v. McKinnon, 196 Fed. 933 C. C. A. 1st Cir. (1912). The receiver of insolvent national bank sought to recover the purchase price of shares of stock sold by the bank to defendant. The bank had purchased them from one M. The defense was that the purchase from M. being *ultra vires*, the bank had no title and conveyed none to defendant and that therefore the consideration for the defendant's promise to pay failed. Held: Though the purchase was *ultra vires* and the transaction voidable, the bank obtained and conveyed good title.

A similar result was reached by the Circuit Court of Appeals of the Second Circuit, in two cases arising out of this same transaction:

Metropolitan Trust Co. v. McKinnon, 172 Fed. 846;

Morse v. U. S., 174 Fed. 539, 551.

Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281. One Kerfoot conveyed to the defendant national bank real property in trust to be conveyed to certain grantees, which conveyance was made. This is an action by heir of grantor to set aside these conveyances. Held: Though this transac-

tion was ultra vires of the bank, title passed by these conveyances; *that only the sovereign can object*. The court says, p. 1043, that:

“This trust should not be permitted to fail and the property to be diverted from those for whom it was intended by treating the conveyance of the bank as a nullity in the absence of a clear statement of legislative intent that it should be so regarded.”

To the same effect are

Smith v. Sheeley, 12 Wallace 358, 20 Law Ed. 430 (bank organized under invalid statute. Held: Good conduit of title.)

Fritz v. Palmer, 132 U. S. 282, 10 Supr. Ct. 93.

The leading case is *Union Natl. Bank v. Matthews*, 98 U. S. 621, 25 Lawyers' Ed. 188 (1878), (National bank may enforce real estate mortgage).

National Bank v. Whitney, 103 U. S. 99, 26 Lawyers' Ed. 443 (1891), (same point).

See also *Emigh v. Earling*, 115 N. W. 128, 27, L. R. A. N. S. 243 Wis. (1909), (national bank conducting a creamery, held liable for debts incurred therein). Affirmed 218 U. S. 27, 54 Lawyers' Ed. 915.

“NO POWER TO REIMBURSE BAKER.”

They argued that Baker ought to escape, even if guilty, on the ground that the receiver has no power to make him the reimbursement. The rea-

son why the receiver has no such power is, they say, because he possesses no funds.

This is certainly an agreeable argument to wrongdoers. Many a receiver is in charge for the express purpose of pursuing such people and yet has no immediate funds, and many a receiver happens to be without funds when in the ordinary operation of receivership he discovers such a fraud. In what way the wrongdoer is entitled to complain we do not see. If he is adjudged not guilty of the wrong, he has been harmed in only a trifling degree by the privilege given the receiver to have his rights adjudged. If, on the other hand, he is adjudged guilty and yet the receiver afterwards cannot raise the money to comply with the reimbursement condition, then the wrongdoer is luckier than ever because he is both adjudged guilty and escapes.

And Baker is exceedingly lucky in the conditions actually imposed by the lower court. We ought not, in point of fact, to pay him back anything at all. A strong line of authority makes it doubtful whether, where a trustee has been guilty of *actual fraud*, his expenditures upon the property are to be repaid. We in this instance, however, could take no chances, for it was possible that the court might decide that Baker was not guilty of wrongdoing intentionally, but merely that there never was a legal sale to Simpson. Now, of course, the testimony has left no doubt of the actual fraud and the lower court has found actual fraud, so we might have omitted reimbursements in the decree.

Yet even in this appeal we felt it safer for the depositors that we maintain our willingness to reimburse. Baker then, we say, is lucky. He will now get back with six per cent. interest, by the decree (82), what he has expended upon this property, \$8,130.19, plus \$2,846.94 interest; not a bad investment for a wrongdoer.

We presume that no contest will be made against the legal status of the present Receiver Schofield. The certificate of his appointment (Plf's Ex. 1) is controlling. (*Sanger v. Upton*, 91 U. S. 45, 59; *Cadle v. Baker*, 20 Wallace 650). Judge Frater never received any discharge and only gave in his resignation just before this suit was commenced (166). The Department wisely refrains from granting formal discharges of these receivers, because additional assets often turn up in these estates (190). Frater therefore resigned a month before this suit was commenced. Schofield was appointed to succeed him. It is universal law that a receivership continues until there is a formal discharge (*Alderson on Receivers*, pp. 894 and 887; *High on Receivers*, 2d Ed. §834) just as in private estates the filing of final accounts by executors is not a termination. (*Denny v. Sayward*, 10 Wash. 422, 431; *Re Estate of Hood*, 98 N. Y. 363; *Whetstone v. McQueen*, 34 So. 229; 2 *Werner on Administrations*, §572; *Fountain v. Mills*, 36 S. E. 428.

ADDENDUM No. 1.

FINAL OPINION OF LOWER COURT.

[In the transcript as ordered (344) our opponents called only for a “memo decision” rendered by the lower court on an interlocutory matter (73). We accordingly print ourselves the *final* opinion on which rests the decree. Printed also in 212 Fed. 504. We have italicised portions and inserted some comment.]

“In June, 1895, the defendant Baker was appointed receiver of the Merchants’ National Bank of Seattle, in which capacity he served until April, 1899, when he was succeeded by A. W. Frater, who served until February, 1913, at which time the plaintiff was appointed as receiver. At the time of the failure of the Merchants’ National Bank, it was the riparian owner of certain lands, and as such upland owner had the preference right under the laws of Washington to purchase certain tide lands, particularly the land in issue in this case, known as Block 430. The receiver, with the approval of the comptroller of the currency, purchased from the State of Washington the said tide lands, and the usual contract was executed by the State and defendant Baker, providing that the payment be made in ten equal installments, payable annually, which contract provided upon payment in full of the consideration named in said contract the State of Washington would issue to the Mer-

cahnts' National Bank or its assignees deeds in fee simple to said tide lands. The complaint alleges that Baker while acting as receiver purported to convey and assign the said contract to Sol G. Simpson on the 26th day of November, 1897; and alleges in substance that defendant Baker and Sol G. Simpson entered into a scheme to defraud the estate by turning Blocks 429 and 430 over to Simpson, with a secret agreement that Simpson was to hold Block 430 for the use and benefit of Baker; that the assignment to Simpson by Baker was to Baker's own use and benefit, and without authority of law and was for the purpose of secretly defrauding the bank, and that at all the times that Simpson held the title to said block it was held in trust for Baker and subject to his control and direction; and that thereafter the said property was transferred by Simpson through mean conveyances at Baker's suggestion to the Seattle Water Front Realty Company, a corporation, promoted by defendant Baker, and of which he is the owner of practically all of the stock; that at the time said block was transferred by Simpson in 1905 it was reasonably worth \$100,000 and is now worth \$300,000; and the bill prays that the court determine what, if any moneys, have been expended upon the property involved in this suit, and that this be repaid to the defendant Baker, and the property held as property to the trust.

The defendant denies all the allegations of fraud and all secret dealing, and also denies the

right and power of the receiver to make the tide land purchase, and sets up the inability of the plaintiff to do equity, and the laches of the plaintiff.

Defendant further contends that on the 6th day of October, 1897, the *defendant Baker obtained an order from the Circuit Court of the United States for the sale of all* doubtful bills receivable, overdrafts, stocks, bonds, securities, etc., and that an order was entered by the court authorizing the sale at private sale of such assets; that thereafter he, as receiver, sold to Sol. G. Simpson tide land Blocks 429 and 430 for the sum of money which he had paid to the State and \$50 profit upon each block; that thereafter on or about March, 1899, he repurchased from Sol G. Simpson Block 430, paying the amount of money which Simpson had advanced on account of said Block, together with taxes and interest, and requested Simpson to retain the title to the said property in his name for the reason that he, Baker, was involved and desired to hide the property from his creditors; that the title to the property was carried in Simpson's name until 1905, when it was transferred to Norton of New York, who held the title for defendant Baker until the organization of the defendant corporation, when it was transferred by defendant Norton to the defendant corporation. The other facts sufficiently appear in the opinion.

NETERER, District Judge.

The defendant contends first, that the preference right to purchase tide lands given to riparian

owners is not a vested right nor a right which could be exercised by the receiver of a national bank. This contention, I think, is definitely disposed of by the State of Washington Supreme Court in the case of *Allen v. Forrest*, 8 Wash. 700, where the right granted by the legislature is confirmed as against the world except the state prior to the exercise of the option, and becomes a vested right after the exercise of the option by the riparian owner, as will be later shown.

“It becomes important in determining the issue here whether the preference right thus given a riparian owner is personal and chattel property or real estate. *In the order of court, under which it is claimed the land in issue was sold*, the receiver was authorized and empowered to “compromise, compound or sell at private sale all assets of said insolvent bank, consisting of bills receivable, judgments, overdrafts, stocks, warrants, securities, assessments upon the stockholders of said bank, all other personal property and chattel property and evidences of indebtedness.” The order is concise, clear and certain. (*Record page 19.*) If the interest of the bank’s receiver in the tide lands is real estate, it would not be comprehended by the order, and the receiver could not under such an order make the sale.

“The powers of the comptroller of the currency and the receiver are defined by act of Congress, Sec. 5234, Rev. St., which provides:

“Such receiver under the direction of the comptroller of the currency * * * upon the order of a court of record of competent jurisdiction * * * may sell all the real estate and personal property * * *.”

To make any sale of assets of a defunct bank an order of a court of record of competent jurisdiction is essential. The receiver cannot sell the real or personal property of the bank without an order of the court, and a sale which is not authorized by an order of court of competent jurisdiction is void. or personal property of the bank without an order

Ellis v. Lytle, 27 Kas. 707, Am. Rep. 424;

Richardson v. Turner, 52 La. 1613;

Toullot v. Booker, 160 S. W. 293.

[See also our citations on p. 32 ante]

“A reading of the order of sale is conclusive of the fact that the receiver was limited to a sale of personal and chattel property. *No real estate is comprehended either in the petition for or order of sale.* Personal and chattel property is a thing movable, which may be annexed to and is attendant on the person of the owner and carried about with him from one part of the world to another. 2 Bla. Com. 14.

“Real property has been defined as an interest which a man has in land. 32 Cyc. 662.

“It sometimes is difficult to determine what is personal and what real property, yet where property has been defined as real property by the state court such holding should be adopted by this court.

"In *Washington Iron Works v. King County*, 20 Wash. 150, appellants had purchased under contract certain tide lands in the City of Seattle, paying one-tenth of the purchase price and covenanted to pay the balance in ten equal annual payments pursuant to a similar contract as in evidence in this case. The assessor of King County assessed the land as real estate, and suit was brought to enjoin the collection of the taxes. The Supreme Court at page 153 said:

"In equity, appellants are the owners, possessing a real and substantial interest, which they can transfer, assign and dispose of as they choose; and the State cannot deprive them of this right. The term 'property' as applied to land, comprehends every species of title, inchoate or complete."

"In *State ex rel. Wilson v. Grays Harbor & Puget Sound Railroad Co.*, 60 Wash, 32, at page 34, the Supreme Court of Washington says:

"There is a distinction between the granting of a privilege which may or may not be exercised and the exercise of that privilege by the person upon whom it has been conferred. In the one case, the State merely confers a right, the acceptance of which is optional. In the other, the option has been exercised and the faith and credit of the State has become involved in its fulfillment."

"It was there held that the preference right of a riparian owner to tide lands is an interest in land and subject to condemnation for railroad right of way. The Supreme Court of Washington in *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, speaking of tide lands purchased under similar contract, at page 455, says:

“The interest of the relators is, to say the least, an interest in land, and as such may be taken for a public use by condemnation, upon payment of just compensation therefor.”

In *State v. Frost*, 25 Wash. 134, speaking of State school lands held under a similar contract of purchase, the court said:

“This is such an interest in land that may be sold for taxes.”

In *Hotchkin v. Bussell*, 46 Wash. 7, the Supreme Court of Washington holds that tide lands held under contract under Sec. 6750, Rem. & Bal. Code, descends directly to the heirs, subject only to the debts of the deceased.

“It appears as a conclusive fact, when the phraseology of the order is considered together with the action of the court and conduct of the receiver with relation to similar property in this trust, the holding of the Supreme Court of Washington that tide land held as was the land in issue was real estate after the exercise of the option to purchase by a riparian owner, and that the sale of land was not contemplated by the order entered.

It is further contended by the defendants that the receiver acquired nothing by the contract of purchase from the State; that the receiver and comptroller of the currency acted without authority in the securing of the contract from the State, and that their act in so doing was ultra vires. Sec. 5137, U. S. Comp. Stat. 1901, is cited in support of this contention. This section provides:

“A national banking association may purchase, hold and convey real estate for the following purposes, and for no others:

“First. Such as shall be necessary for its accommodation in the transaction of its business.

“Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

“Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

“Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

“But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.”

“The powers of the receiver of a national bank are defined by the following sections of the Revised Statutes:

“5234. Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct.”

“5236. From time to time * * * the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction

or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated."

Act of March 29, 1886 (p. 3514 of U. S. Comp. Stats.), provides:

"That whenever the receiver * * * shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property real or personal, by reason of any bond, mortgage, assignment or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the comptroller of the currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale."

An examination of these sections of the statute appears to be conclusive of the fact that there is no merit in the contention of the defendant. It must be assumed in the absence of a contrary showing that the ownership of the upland by the bank was authorized. The ownership of the upland carried with it a valuable privilege which was a part and appurtenant to the upland, of which privilege the receiver could avail himself by making certain payments assessed by the State, in the way of appraisals of the value of the land. These assessments or payments covered a period of ten years.

Not only did the receiver have the power under these sections of the Revised Statutes to exercise this privilege, and protect the security for which the upland was held by the bank, but it was his duty to do so. Even though a doubt existed as to the right of the bank to acquire the tide land, the receiver could not be heard to challenge such right. This holding on the part of the receiver would be good as against the world except the government.

Union National Bank v. Matthews, 98 U. S. 621;

McMichen v. Perrin, 59 U. S. 507;

National Bank v. Whitney, 103 U. S. 99;

Cowen v. Hurst, 83 N. W. 274 (Mich.);

Thompson v. St. Nicholas Nat'l Bank, 146 U. S. 240 .

“The tide land being lawfully obtained, and being rightfully in the possession of the receiver, it is contended on the part of the plaintiff that the attempted sale of the tide land to Simpson was without authority, and the re-purchase of this land by the defendant Baker in March, 1899, as contended, re-invested the trust with this property, even though the prior sale had been made in good faith, and was duly authorized by order of court, and it is strongly urged that it is the duty of the trustee to exercise all of his powers and faculties in the interest of and for the benefit of the trust, and that he could not be a seller and a buyer at the same time, and on becoming re-invested with the equitable title during his receivership, the policy of

the law would not permit it to be other than a trust transaction.

It has always been the policy of the law, as it is administered in courts of equity, to remove as far as possible from persons acting in a trust relation, all temptation with a view of not only having the trust administered justly, but also to have it administered in such a way that not only will justice be done, but that the public may know that justice is being done. Hence a person acting as a trustee has not been permitted to be interested in any transaction which in any way would be incompatible with his best services for the cestui que trust. "Equity will not permit trust property to be reconveyed to the trustee before his duties as trustee are ended for the same consideration for which it was sold. Sound policy requires all the skill and effort of the trustee to be used for the benefit of the cestui que trust."

Boynton v. Brastow, 53 Me. 362.

To the same effect is *Michoud v. Girod*, 4 How. 503; *Creveling v. Fritz*, 34 N. J. Eq. 34; *Toustelot v. Booker*, 160 S. W. 293 (Tex.). Courts have held that where an administrator sold land, and while he was yet administrator became an owner of some of the property sold for the same consideration, this dissipates his defense of good faith.

Haulihan v. Fogarty, 127 N. W. 793;

Guerrero v. Balerino, 48 Cal. 118;

Winter v. Truax, 49 N. W. 604.

“Much reliance is placed by defendant Baker on *Robertson v. Chapman*, 152 U. S. 673. The court at page 681 says:

“He could not, directly or indirectly, become the purchaser and maintain any title thus acquired as against his principal; for, in so purchasing, his duty and his interest would come in conflict. If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act, in the matter of such agency solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal.”

“In that case the agent did report the purchase. On page 683 the court says:

“That the defendant Polk did not intend to conceal the fact of his purchase, is made clear by his letter of May 1, 1886, in which he informed the plaintiff that he had ‘traded O’Donohoe out of the property.’ ”

"In the instant case the principal was never notified and information was suppressed even from the general public.

"The testimony in this case shows that the transfer of the contract to purchase Blocks 429 and 430 from the defendant Baker as receiver to Mr. Simpson was a private transaction between the parties and was made in October, 1897. Baker's receivership ended in April, 1899. May 9, 1904, Baker wrote the following letter to Mr. Reed, the agent of Simpson:

"May 9, '04.

"Mr. Mark Reed, Seattle.

"Dear Sir: I had a talk with Mr. Simpson in S. F. about the tide land which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first 2 or 3 payments I made myself. Mr. Simpson's books, however, will show the status of the account. There is one more payment due next March to complete the contract with the State. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson and send same to Chicago, and I will send you from there a form of assignment to execute, together with note for the account, due 1 year after date, which plan Mr. S. consented to and will doubtless advise you to that effect.

"I may be away several months, and I may have occasion to use the item, or to dispose of it, and so I think it had better be put in the shape indicated.

"My address will be as below.

"Yours very truly,

"CHAS H. BAKER,

"Auditorium Annex, "Chicago.

“I believe there is an item to my credit also of a certain sum for right of way across the tract sold to the N. P.”

Baker subsequently paid to Simpson all moneys paid by Simpson on account of Block 430. The title to this block was thereupon transferred to Baker's New York attorney in 1905. Baker subsequently promoted the Seattle Water Front Realty Company, and Block 430 was conveyed to it in full payment of its capital stock, \$250,000. Baker was not a party to the incorporation, nor was he at any time an officer or trustee. He has during all of the time owned 95 per cent. of the stock. The other five per cent. was held by friends. *Baker at no time was known to the public as being in any way interested in said tide lands, nor was the plaintiff or his predecessor advised that defendant Baker claimed any interest in said lot. No one connected with the trust, so far as the evidence shows, knew anything about Baker's interest in this land until about the time of bringing this action.*

In March, 1899, about the time that Baker claims to have purchased from Simpson Block 430 for the moneys actually expended by Simpson for said block, William Pigott, on behalf of his company, purchased [*actually only a part*] Block 431, which is less valuable than Block 430, for \$1,750. In December, 1899, Pigott for his concern purchased Blocks 441, 442, 443, 444, and part of Blocks 429 and 432 for \$5,000 cash. He endeavored to purchase Lots 430 and saw defendant Baker, who

referred him to Simpson. He saw Simpson, who said there were others interested in the block, but finally made a price of \$30,000 for Block 430. These negotiations covered a period of "about two or three years," commencing in March, 1899. The value of Block 430, the land in issue, at the time the defendant Baker claims to have purchased from Simpson [*for about \$400.00*] was from \$5,000 to \$15,000. Simpson told Turner some time during the year of 1898-99 that "those lands belong to Charley Baker, that he was carrying the title for him to accommodate him," and also made a statement to Mr. Roche, his private secretary, and to Mr. Reed, his son-in-law, who was acting as his attorney in fact, that he held the title to the lands for the defendant Baker. *There is no doubt in my mind from the evidence presented here that there was a condition of mind between Baker and Simpson, express or otherwise, which was that Baker should have Block 430. Where the relation of the parties, the value of the land, and all of the circumstances as disclosed by the evidence is analyzed and applied, together with the suppression of the ownership of defendant Baker, the conclusion is inevitable.* (*See Deed, Dec. 4, 1897*)

"It is next contended that the plaintiff is guilty of laches and should not be permitted to prosecute this action. I do not think that his suggestion has any force under the evidence of this case. *Lapse of time* is no bar and laches cannot be asserted until knowledge is brought home to the plaintiff or such

notorious condition or relation to the property in issue by the defendant, that the plaintiff should have known, and *such condition is not disclosed by the evidence.*

Michoud v. Girod, 4 How. 503;

Russell v. Huntington, 162 Fed. 868;

Prevost v. Gratz, 6 Wheat, 481;

Townsend v. Vanderwerker, 160 U. S. 171.

“Finally, it is asserted that innocent purchasers for value are involved, and that the plaintiff cannot do equity, and the court must leave the parties where it found them.

“The testimony shows that all of the stock was paid by transferring the tide land in issue. The parties who subsequently acquired stock stand in no better position than Baker, through whose subscription and transfer of the land the stock was acquired. Equity will be fully compensated by paying to the defendant Baker or Seattle Water Front Realty Company all moneys paid on account of the purchase of said land and all taxes and assessments, together with interest on such several amounts from the date of payment, such payment to be made within ninety days from date of entering of final decree.”

ADDENDUM No. 2.

ECKELS' REQUEST THAT BAKER ADJUDICATE THE
\$10,000 NOTE.

This is our Exhibit No. 22. Our opponents have *not* caused this letter to be printed in the record, though it will be noticed they have caused to be printed Mr. Baker's graceful letter of resignation of two years later, on which we comment in our next addendum.

“November 10, 1897.

“Charles H. Baker,
“Receiver, etc.,
“Seattle, Wash.

“Dear Sir:

“I am in receipt of yours of the 29th ultimo, stating your position in regard to your indebtedness to the trust, also of the report of the condition of the record of the proceedings under which your collateral was sold and the written opinion of Judge Stratton, furnished by Mr. Seeley at his request. It is due to yourself as well as the creditors of your trust that the matter be adjudicated at once. Judge Stratton takes the position that the value of the bonds of the Rainier Power & Railway Company, face \$20,000.00, when sold to the bank, was sufficient or more than sufficient to pay your note of \$10,000.00 to the Merchants' National Bank. The matter in that view can be treated as a claim for an offset by you and the whole dispute brought before the court for settlement on an agreed statement of facts, and I suggest that a petition be prepared, ‘In the Matter of Claim of Charles H. Baker for Allowance of Offset to his Indebtedness to the Merchants' National Bank.’ The facts all appear to be matters of record and an agreed statement there-

of can be accurately made without any difficulty and submitted with said petition in open court, and the question argued by the attorneys representing the creditors and yourself. It would seem advisable that some outside attorney without interest represent the creditors and you employ such counsel as you see fit. Messrs. Stratton, Lewis & Powell, now representing the trust, doubtless will not desire to appear in the matter in any capacity. A stipulation should be entered into to the effect that all parties will be bound by the decision of the court, and that you will, in the event of the sale of the bonds being declared legal, at once arrange for the settlement of your indebtedness upon a reasonable basis commensurate with the salary which you have been receiving from said trust.

“Please advise me promptly if this procedure is satisfactory to you, in order that I may name an attorney to represent the trust in preparing the statement of facts and making argument before the court.

“Very respectfully,

“JAMES H. ECKELS,

“Comptroller.”

What honorable man could have refused this offer, made after he had been permitted to occupy his indelicate position two years? But here is all the explanation he can give:

“Q. You did not claim a legal adjudication under the permission given you by Mr. Eckels, did you?

“A. No.

“Q. Now, then, you quit the trust owing it \$10,000.00, so far as you had attempted to clear yourself from it in any court, had you?

“A. So far as any adjudicated claim is concerned.

“Q. You had the right to bring suit for cancellation of that note. Did you do so?

“A. No.” (303).

And we have already noted that he finally got rid of the note by having his father’s lawyer bid it in at a sale of worthless assets.

“Q. Your \$10,000.00 note, then, was sold as a worthless asset of the bank and your father bought it in?

“A. No, it was sold to somebody out of the bank and Mr. Hardin bought it from him later on.

“Q. This Hardin is your lawyer?

“A. Yes.” (305).

The fair proposal of Eckels (who, if he had not been the intimate friend of Baker’s father, would undoubtedly have insisted long before) was ignored by Baker for nearly two years, until March 1899, when the new comptroller, Dawes, became decisive. We print Baker’s second letter of resignation, with our comments, in our next addendum.

Our opponents have printed a letter written by the writer of this brief, recommending Baker for postmaster in handsome terms. That letter was written in 1894, so it antedated Baker’s receivership and the character which he revealed under temptations. As Baker’s own story in this case confesses utter lack of delicacy and many secretive and improper actions, it is not necessary to explain a letter of recommendation written before. Our opponents have also printed a letter written by Mr. Dawes favorably introducing Mr. Baker. That let-

ter was written several years after Baker's receiver-ship. According to his own story Baker, at the time he got this letter from the former comptroller, Dawes, was secreting an asset of this bank, and as Baker took the stand in this case, he had an opportunity to state, had he so desired, that he was at the pains to tell Mr. Dawes, in asking for this letter of introduction, that he had twelve acres of the bank's tide lands secreted in the name of another man.

ADDENDUM No. 3.

BAKER'S LETTER OF RESIGNATION.

Baker practically admits (p. 301), that on Dawes' ruling on the \$10,000.00 note, he had to leave the receivership. Like many others, when forced to resign, he determined on a voluntary and virtuous resignation.

“Seattle, Washington, March 13, 1899.

“Hon. Charles G. Dawes,

“Comptroller of the Currency,

“Washington, D. C.

“Dear Sir:

“I respectfully call your attention to your recent decision, whereby a note signed by me prior to the suspension of the bank now becomes an asset of the trust.

[Observe “now becomes.” There never was a time when this was not considered an asset. He so admits himself (301). He assumes that

his position had become indelicate all of a sudden.]

This places me in the embarrassing situation of debtor to my own trust, and coming as it does under your decision, it would seem that any right of offset or defense I may have had will no longer hold.

[This was no more true in '99 than it was in '97, when Eckels (Addendum 2) invited him to submit the "offset" to a court.]

I am further in the unfortunate situation of having no money or property or means with which to effect a payment or compromise,

[In this very month, by his own story, p. 271, he was secretly acquiring Block 430, 12 acres of splendidly situated tide lands. They were then worth approximately \$10,000.00 and could have paid this note.]

which is made more embarrassing by the fact that there are several notes of similar magnitude in other banks, signed by myself.

"My relationship to the trust is inconsistent, therefore, and for that reason I tender you my resignation as receiver.

[It had been inconsistent from the very beginning, four years past, when the creditors, (298), protested against his appointment.]

' 'The proper administration of the trust at the present time should receive all the receiver's time and attention in order to do it justice, and this I am unable to give. I believe it impossible to continue the operation of the trust under the reduced appropriation; which is a further reason why my trust should be vacated. I therefore offer you my resignation, subject to your early convenience and pleasure.

“I would state in this connection that Mr. J. B. Hill has been my assistant and is familiar with the diversified interests and items of the trust in a way that would take a new man several months to become acquainted with, and he would be entirely worthy your consideration as a successor.

[Observe. He was leaving to his successor a claimed liability of \$10,000.00 and interest. He now recommends as such successor an intimate friend, who owed him an existing employment.]

I could not have kept him recently except for his personal regard for me, as the compensation was not adequate for a gentleman of his attainments,

[Hill, by his own statement, had been in the honest but not learned occupation of a grocer (240) in 1895, when Baker gave him a clerkship. “Attainments.”]

and the fact that outside opportunities are becoming very prevalent; however, with the increased compensation which a receiver would get. he would be willing and able to devote all his time to your trust in a loyal, energetic and efficient manner.

“I desire to thank you personally for the uniform courtesy and consideration you have extended to me and to assure you that from my own standpoint, the official relationship has been as pleasant as possible, and I will consider that I am under obligations to you, so that you may at all times that you so desire, command me.

“Very respectfully,

“CHARLES H. BAKER,

“Receiver.”

“Mr. Hill informs me that he was candidate for receiver of Columbia National Bank of Tacoma, and he respectfully refers to his testimonials filed

in your department in October, November and December, 1896."

[The very next day after thus resigning he took up the "Pigott-Hofius transaction" so profitable to his friend Anderson. See next Addendum.]

ADDENDUM 4.

THE PIGOTT-HOFIUS TRANSACTION.

This occurred in March-April '99, while Baker was still receiver. It was not a sale of the block in question here (172). That had been sold to Simpson in November, 1897. It was a sale of the bank's remaining tide lands surrounding Block 430, (other than block 429, which also had been sold in 1897 to Simpson.)

This latter transaction was brought into the case by us to show the values in March-April, '99, the time when, according to Baker's story, he was buying back the best block of all for mere "cost and interest." In this Pigott-Hofius transaction this very receiver was selling inferior blocks at a rate so much higher that his pretense of buying back at cost and interest, and what is worse his absolute statement that he believed this paltry sum to be the "value," (284), were both false and improbable. His own testimony overwhelms him (290).

William Pigott, vice-president of the Pacific Coast Steel Company, paid \$1700 for merely contested rights in Block 431(329)and moreover for only a *portion* of that block (332), while buying the surrounding tide lands for \$5000, (429, 443, 444, and parts of two or three others.) Notice 429. This was the block that Simpson had kept for himself in the sale of 429 and 430 to him in 1897. Simpson being now in '99 a seller of 429 to Pigott, was himself as well advised as Baker of the great increase of these properties in value. Why should he let the best block of all, twelve acres with sea front, which the others did not have, go for about \$400? Besides, the testimony of other witnesses shows that Block 430 was then worth very much more than even Pigott was paying (p. 118).

But in addition to making Baker's repurchase story improbable, this Pigott-Hofius transaction throws further light on his character. He deliberately deceived the Comptroller, Dawes, as to the real purchaser. It is a curious bit of deceit; a device to make a profit to one Anderson, who was his intimate friend (290). Your Honors will see on page 313 that on March 14, '99, Baker receipted to Anderson for \$1000.00 in purchase of Block 431. Now, he did not wish to report Anderson's name to the Department in requesting authority to confirm this sale because, as he testified (314), he had been accused of selling certain bonds to Anderson "at a grossly inadequate price" and an inspector had had to investigate the matter. Consequently he re-

ports not Anderson's name, but Hofius', to the Department. That Anderson made an inordinate profit is clear from Pigott's testimony (329). And Baker's statement (322) that "he did not know Anderson was making any profit" seems absurd.

Now, Baker knew Pigott very well (314) and could have made the transaction himself. Anderson instantly indorsed the receipt shown on page 313, and it was then treated as a transaction of Hofius & Company. That this receiver should have given Anderson an intermediary right of sale without believing that Anderson was making a profit is absurd, and yet he so testifies (bottom p. 314). He then reports the transaction to the Comptroller without Anderson's name and shows the price in a way profitable to the trust, but of course does not show the other check, \$750.00, which Pigott was giving Anderson. Now the Comptroller had been cautious, and before giving him authority had said (319):

"If you and the representative interests of your trust are satisfied that this is for the best interest of the creditors *and the best proposition you can obtain*, you are authorized to petition the court for an order to sell," etc.

Now on Block 431 Anderson was by undisputed testimony making a profit instantaneously of \$750.00 on a sale for \$1750. How much he made on the other transactions for the remaining blocks detailed by Pigott at the bottom of page 329, will probably never be known.

This business Baker did, moreover, in the last days of his receivership. He actually kept Frater waiting for his commission while he did it (169). Judge Frater became suspicious but could not get facts enough to make an attack (171).

COMMENTS ON OPPONENTS' BRIEF.

The preceding part of our brief was prepared before we received our opponents'.

Their Statement of the Case.

It was nearly impossible that their statement be candid. It is in fact most uncandid.

A. "*Deaths.*" Turning to the top of their page 4, the first eight lines contain at least half a dozen misleading statements. They had commenced with, "There were six principal witnesses to the transaction." Then they enumerate these as nearly all lost by death. Why do they mention A. H. Anderson? Baker himself does not mention him as having been present at all, either at the sale to Simpson in '97 or at the "repurchase" from Simpson in the spring of '99. The first transaction Baker relates at pages 262-3 of the record, the second at pages 270-1, 284, 295, and the professional statements of Mr. Grosseup and Mr. Bausman (224-6) make it clear that Anderson either never knew anything about these transactions or was

willing not to recall them. His name was brought into it only on account of a collateral transaction, the Pigott-Hofius purchase of the *remaining* tide lands in '99, (for his queer part in that, see *supra* *Addendum* 4) a transaction brought in by us purely to show the value of Block 430 in '99 as shown by the sums paid for the remaining tide lands. It also threw light on Baker's character in his suppression of Anderson's name, all of which Baker's own testimony and the exhibits (313) fully disclose. *Second.* They mention Hofius as a dead witness lost. Why Hofius? Though Hofius's name was used in the Pigott-Hofius sale, it was admitted by Baker himself that the transaction *was conducted by Pigott.* (314). The dead Hofius, then, knew nothing about the transaction. *The living Pigott testified directly against Baker.* *Third.* They mention Seeley, the examiner, as dead. Yet Seeley's correspondence has been introduced both by them and us. There is no controversy as to what he reported, because it is in writing. Not a shadow of claim was made anywhere by either party that if living he would contradict or vary or reinforce any statements of either side. Nobody claims that he knew of the subsequent sale to Simpson. He left Seattle in '97 before that. *Fourth.* They mention one Tyler, obscurely referred to by the receiver's bookkeeper, J. B. Hill, as having made some entries at Hill's direction. (232-3). It was not pretended that he was present at any interview or knew anything about the transaction other than

to make clerical entries, nor is there any contention as to what amounts were paid *to* the receivership by Simpson in 1897. *Fifth*. They mention Simpson, the purchaser, as dead, and yet we have already shown (*ante* 75) that Simpson, if alive, could not contradict Baker's own story without making them both ridiculous.

Against Baker all living witnesses have testified, Turner, Rotch, Pigott, Reed, and even J. B. Hill, his own bookkeeper, injured him as much as any other witness. (*ante* 26-7).

We have already shown (*ante* 28) that, lamenting the absence of witnesses who are dead, the defendant Baker has failed to call several living witnesses, his own lawyers, who he admits were acquainted with these transactions.

All this, however, is superfluous. Our case was made out of Baker's own mouth.

B. A person reading our opponents' "statement as disclosed by the evidence" would find in the whole of it, pages 18 to 54, not one reference which would clearly bring out to the court any of the following damaging facts against Baker admitted by himself: *First*, that his repurchase was at cost and interest. *Second*, that it occurred distinctly during his receivership. *Third*, that the actual values, when he did so repurchase, in '99, were greatly in excess of mere "cost and interest," \$400.00. *Fourth*, his suppression of the sale in his *special* report to the new comptroller, Dawes, in '98.

(*ante*, 14). *Fifth*, the absolute secrecy of the '99 "repurchase." Nothing can the court find in this long statement of theirs to explain also his damaging changes in his answer after our discovery of the railway letter, not a word about the \$10,000.00 note, which throws such a light upon his character and his additional motives for secrecy toward his successor and the comptroller; not a word about the dummy corporation and his keeping his name off the directorship and the sudden removal of its records to New York; not a single word about the fact that Norton held unrecorded declarations of trust for two years for this man; not a word in explanation of his failure to call witnesses Brockett, Hardin and Meacham; not a word about his admission that when he "repurchased," as he call it, from Simpson in the spring of '99, Simpson gave him, according to his own story, not one scrap of paper, but held the title during six years from '99 to 1905, just as he had held it from '97 to '99.

Our Opponents' Law Argument.

Our opponents, in drawing their brief, had not before them, to be sure, a copy of ours, but what ours would contain could of course not be unknown to them from experience below. Moreover, the points to be raised in ours were points averred to by the lower court in its final opinion. We conclude, accordingly, that our opponents have already

done all they can to meet the three propositions which we have formulated on our page 31.

Let us advert again to these three legal conclusions of ours in the light of our opponents' brief.

First. Our first was that the '97 sale to Simpson was void because (a) the tide lands were realty; (b) that no asset can be sold without the order of a court; (c) that the order of court did not at all include the right to sell realty. The lower court (Addendum 1 ante) fully covered this point by reference to State and Federal laws and decisions absolutely incontrovertible, and we too have discussed it fully on pages 31-34. *This question then was squarely placed before our opponents long ago. Where do they seek to answer it?*

Second. Our second conclusion was that even if there was a legal sale in '97, it was actually for Baker's own benefit (ante 34). We left that to this court upon the facts, adverting, however, to the opinion of the lower court as reinforcing us by its finding, included also in the decree. Again saying that we do not see how the lower court could possibly have found other than it did on this head, we pass to our next.

Third. Our third point was that in any event, Baker's repurchasing, especially at mere cost and interest, during his term as receiver caused such repurchase to inure to this receivership. An answer to our full line of authorities on our page 35 is attempted by learned counsel on page 107. Nobody

can compare either the arguments or the authorities and agree for one moment, we think, with our opponents. They are overwhelmed by both law and reason. Why do they cite *Robertson v. Chapman* and leave out a certain critical distinction which is made in that case? They quote freely and leave out the distinction there made by the Supreme Court itself, that is to say, that the agent repurchasing let his principal know of that fact. (ante 41). The lower court here in its final opinion adverts to the fact that our opponents had cited this case, and that this distinguishing feature, which the court then quoted to them, was in it.

Statutes of Limitation.

On page 43 ante we stated that if the sale to Simpson in '97 was void in law, then this court was confronted not with the question of laches but only with whatever rights defendants might have under statutes of limitation. Citing these statutes, we stated that it would be impossible for Baker, even by payment of taxes during the statutory period, to come within other requirements of local law in respect to good faith and color of title, this on account of his fiduciary relation and personal knowledge of the defects, if any, in his title.

We now have before us their brief and we do not find any argument raised in support of their assignment of error on the statute of limitations.

Laches.

We accordingly feel that this court, agreeing with the lower court that the sale to Simpson in '97 was void as an unauthorized sale of realty, will not trouble itself deeply on laches.

However, should the court take up that subject, it will find that we have rightly anticipated the error of our opponents in their list of authorities, and that they have failed to see the distinction between fiduciary and non-fiduciary cases. We mention in their order their citations.

Felix v. Patrick, (on their page 76. See our p. 51) is not a case of fiduciary relations at all. A hasty glance at it, on account of the use of the word "trust" might mislead. The court makes it clear, as we have pointed out on page 51, that there were no relations other than antagonistic ones between the parties.

Hart v. Heidweyer. (their page 77). At the very outset our opponents disclose that this case was one of creditors' pursuit of debtor's property. No confidential relations are even pretended to have existed.

Patterson v. Hewitt. (their p. 84, our p. 50). This citation is indeed one of confidential relations, yet it seems most unjust in our opponents to cite it without adverting to the fact that the court in applying laches against the plaintiff expressly drew attention to the fact that the defendant had "openly repudiated" the trust to his beneficiary and thus

set laches in motion. This is the very essence of our distinction between fiduciary and non-fiduciary cases. Laches does apply after the fiduciary does his part in avowing an antagonistic relation, and squarely putting his cestuis upon notice and compelling them to acquiesce or to proceed against him.

Ferrel v. Lord, (their p. 85), a non-fiduciary case. Yet even there the court in holding plaintiffs to diligence found that they *actually* knew of the state of affairs. They were guilty not merely of negligence *to* discover but *after* discovery.

“All these facts were known to the appellants who, although under no disability, failed to assert,” etc. (page 676 of 43 Wash.). Knew what? That the adverse party openly claimed the land and took possession (*ib.*). We should like to know where in the record Baker let anybody know of his interest.

Newbury v. Wilkinson. (their p. 86). Here again is cited a case that is not one of confidential relations. The persons whom the plaintiff was suing were the sureties upon guardian's bond. They owed him none of the obligations of a fiduciary's candor, nor had they dealt in any way in trust property. He had a claim against their principal for misconduct. He did not sue the principal, then dead, but sued them. They could stand and properly did stand upon the strictest law of diligence against a plaintiff. The case seems to us correctly decided and to have no application to this.

And the two cases which are quoted in *Newbury v. Wilkinson*, are neither of them cases against fiduciaries. They are *Nash v. Ingalls*, and *Foster v. Railroad Co.* As to the former see our p. 52. The latter was a case of attempt to set aside a railway foreclosure after long delay.

Gallaher v. Cadwell. (their page 87). Not in the remotest degree affecting fiduciary relations. On the contrary, a case most properly decided without reference to such doctrines, a land office entry woman complaining of a stranger's getting another entry with knowledge that hers existed and then waiting several years while Tacoma was built up on the property.

Duxbury v. Boyce. (their p. 88). They themselves state it as a case "to set aside conveyance on the ground that it was made with the intent to defraud creditors." This disposes of it plainly.

First National Bank v. Strait. (their p. 90). What element of fiduciary relation exists in it we are not yet able to see.

Thompson v. German Ins. Co. (77 Fed. 258). A suit by the receiver of a national bank to collect assessments on the shareholders, including one against a dummy transferee. Not one scintilla of fiduciary relation.

Wood v. Carpenter. (their p. 94, our p. 49). One of the leading cases of creditors' suits. Our opponents' statement of it shows the utter absence of fiduciary relations.

Teall v. Slaven. (their p. 96). The only case applicable at all, misuse by an attorney-in-fact of his agency. Thirty-two years delay during which a town grew to a city and thousands of innocent investors would have to be ruined. Surely a poor citation here to these vacant unimproved tide lands.

Hammond v. Hopkins. (their p. 96, our page 49). A fiduciary case, but here our opponents again leave out the most distinguishing feature of that case. It was a fiduciary case in which laches applied, but why? Because, as we have distinctly noted (*ante* 50), the purchase of the trustee had been “openly announced in the family.” Consequently what the Supreme Court was discussing was not laches *to* discover, but laches *after* discovery, that is to say, laches after notice. Everybody admits laches has application in fiduciary cases. But it is laches after notice brought home, after the discharge of the obligation of candor by the fiduciary.

Their citations on laches summed up fall into two classes. First, creditors’ suits, in which alone is found the rule about how, when, and where knowledge was acquired by complainant for his suit; second, fiduciary cases, in none of which is any such rule imposed upon complainant but in which laches is discussed and applied because defendant showed in each instance that he *did* let the beneficiaries know of his hostile attitude or purchase—in, laches being reckoned only from that time (*ante* 63).

Lastly, even as to the creditors' cases, observe that *Hardt v. Heidweyer*, *Wood v. Carpenter*, and all the rest that lay down the "diligence to discover" rule, *arose on demurrer*. It is a rule of pleading. Defendants have a right, before being put to the expense of trial, to demand a showing of such diligence in these non-fiduciary cases, there having been no duty in defendant to advise or disclose.

The present case, whatever might be the preceding rule, is now on final proof. Should your Honors, like the Supreme Court on final proof in *Oliver v. Piatt*, *ante* 61,, be uncertain in your minds as to the exact date of knowledge in complainant, you would do as the court did there, decide what, *under the testimony*, was the earliest possible date.

Now, let us see. You would of course take Baker's own story as binding on him.

(1) He nowhere asserts that he or any one in his behalf did advise the Comptroller or the creditors of his "repurchase" or of any subsequent interest.

(2) On the contrary, he does say that between '99 and 1905 Simpson carried it "confidentially in his name" without a scrap of paper (284-5).

(3) Nay, more, he not only admits this secrecy but gives a positive reason for secrecy, his creditors, some of whom were judgment creditors (271) and one of them this very estate (285).

Now down to 1905 this court must assume his complete secrecy. The subsequent period (see *Oliver v. Piatt, supra*), is too short for laches against a fiduciary not showing heavy improvements on the property, openly, and in the *belief* that it had become his.

Next, after 1905.

(1) As before, no assertion by him that he did advise anybody.

(2) Assignment at Olympia (not in the King County records) from Simpson, not to Baker but to Norton of New York. Deed direct from the State to Norton.

(3) Non-recording of that lawyer's two declarations of trust, 1905-7.

(4) In 1907 organization of a Seattle company and removal of *all* its records to New York and most careful withholding of Baker's name from its directory and from nearly all its stock.

(5) That nobody testifies that they knew of his interest and a close friend testifies that he did not know.

Here, then, we stand, on final proof. What else can this court do than affirm Judge Neterer's finding of complete secrecy (*ante* ~~111~~?) ?

Rather than permit such technicality as the how, when and where rule to protect actual fraud proved as here, this court will consider the bill as a *bill of discovery* and the proof accordingly.

All the foregoing is sufficient without repeating our argument, page 44 *ante*, that the Comptroller could not deprive the depositors of this bank of their rights, he a fellow fiduciary of Baker's. We do not see how one executor secretly buying an asset can excuse himself by saying he whispered it to his co-executor.

The court will finally be struck by the failure of our opponents to discuss at all the rule that mere lapse of time is not enough in laches but that some loss or honestly incurred disadvantage in the defendant must be shown by him if wrong doing is made out.

The Wing Examination in '98.

Our opponents discuss this on their pages 97 et seq. They do it and still do not disclose to this court the utter inconsistency of their position. Until '99, according to their theory of defense, Baker had no interest in this property. Now they do not press the fact that Wing made his examination in '98. Are they then to have the benefit of charging us with negligence and at the same time saying there was nothing to discover?

We have discussed this Wing transaction on our page 78, particularly noting the unfairness of defendants' position in saying that we should have been prepared at the trial to supply all kinds of records about Wing, whose name was never mentioned by them in their pleadings and was used

for the first time in the trial. This was clearly a matter for defense, and clearly it was for them to produce any pertinent records in the Comptroller's office (*ante* 80).

Incidentally we note that learned counsel have been at the pains to mention, where it seems to us they might mention matters much more pertinent entirely left out of their statement, that scrutiny had been drawn upon Mr. Baker by a rival electrical syndicate in Seattle. We suggest that some of the scrutiny was caused by the fact, not mentioned by learned counsel themselves, that a receiver, kept in position purely by political influences and owing the estate \$10,000.00, which he would neither pay nor adjudicate an alleged defense to, might have brought some of these suspicions on himself.

Turner and Rotch Testimony.

We discussed this at page 70 *ante*. We now have our opponents' argument which we think requires little discussion.

They now, however, take a new view of its consequences. After all, they argue, the statements of Turner and Rotch that Simpson said Baker had an interest, (supposing them to be admissible in law), do not contradict Mr. Baker, for, say they, after March '99, Mr. Baker did have an interest.

But they do contradict him. They contradict him in two ways. First, Baker was giving out to

the world, notwithstanding his repurchase of '99, that Simpson was still the owner. This is what he told Pigott, who during two or three years after '99 tried to purchase the property from Baker (330). This is what he concedes himself when he says that on account of his creditors, he had Simpson carry this thing "confidentially in his name" between '99 and 1900. Thus they both contradict him practically. But one of them contradicts him still more deeply. This is Turner. We have already noted that Turner fixes one of these conversations with Simpson as in the year '98 (*ante*, 29). Simpson's saying that the matter "would not bear investigation." Thus one of Simpson's admissions antedates the period when Baker does admit an interest. It contradicts his statement that he had no interest before '99 and supports the finding of the court in its opinion that he had an understanding with Simpson from the start.

The '97 General Report.

This is a small matter, but it is well to be clear upon it. When Baker asked the Comptroller for permission to buy the tide lands from the State early in '97, he did not mention the contract numbers with which the State labels these contracts. He mentioned only certain "blocks" by plat. There is no evidence that the Comptroller ever knew them by contract number. Now when Baker sold to Simpson in November and reported the sale, two

things are to be noticed. He reports this sale not only in a very general voluminous report, but only by contract number and not by the block. We speak of this general report as voluminous. Small matters could easily get lost in it or escape the attention of a distant office. The original exhibit has come to this court as our Exhibit 9, but our opponents, instead of introducing the report as a whole, selected a specific section referring to this sale, and have printed that on page 200, where it looks very prominent. Now, the original exhibit in its full size is with the other original exhibits transmitted to this court. Your Honors will speedily see that this item becomes there a fairly obscure one. See Baker's examination on this point (296-8).

While this is the least significant of many queer things, it deserves clear notice here in conjunction with the fact that when a few months later the new comptroller, Dawes, called for a special report of everything done under the Seeley order, this sale to Simpson was entirely omitted. (*ante*, 14).

In Conclusion.

The court will notice that the following points made by us are either not anticipated or, from experience in the lower court, are ignored by our opponents.

1. That the sale to Simpson in '97 was void.

2. That the Comptroller as a fellow fiduciary could not waive any of the rights of the creditors of this estate or acquiesce in Baker's misconduct. (*ante* 44).

3. The distinction between fiduciary and non-fiduciary cases and the duty of avowal by the fiduciary. (*ante* 49).

4. The rule in express trusts. (*ante* 62.)

5. The rule in actual fraud proved. (*ante* 65).

6. That in arguing on laches, Baker invokes only lapse of time and none of the prejudicial changes essential in laches (*ante*, 74).

Respectfully submitted,

FREDERICK BAUSMAN,
DANIEL KELLEHER,
ROBERT P. OLDHAM,
ROBERT C. GOODALE.

Counsel for Appellee.

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES H. BAKER, ALGERNON S. NORTON
and SEATTLE WATER FRONT REALTY
COMPANY, a corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the Mer-
chants' National Bank of Seattle,

Appellee.

REPLY BRIEF OF APPELLANTS

Upon Appeal from the United States District Court
for the Western District of Washington
Northern Division.

B. S. GROSSCUP,
W. C. MORROW,

Bank of California Building,
Tacoma, Washington.

CORWIN S. SHANK,
HORATIO C. BELT,

Alaska Building,
Seattle, Washington.

FILED

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F. D. MONCKTON,
CLERK.

Solicitors for Appellants.

NO. 2438

**IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
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CHARLES H. BAKER, ALGERNON S. NORTON
and SEATTLE WATER FRONT REALTY
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JOHN W. SCHOFIELD, as Receiver of the Mer-
chants' National Bank of Seattle,
Appellee.

REPLY BRIEF OF APPELLANTS

**Upon Appeal from the United States District Court
for the Western District of Washington
Northern Division.**

CORRECTIONS

Appellee in referring to the statement in Mr. Baker's letter to Mr. Simpson dated May 9, 1904, would have the court believe that "the first two or three payments" mentioned in this letter referred to receivership money. We will quote the testi-

mony on this point that shows conclusively that these payments referred to those made by Mr. Baker to Mr. Simpson.

“Q. Mr. Baker, in connection with your letter of May 9, 1904, to Mr. Mark Reed, you use this language: ‘I had a talk with Mr. Simpson in S. F. about the tide lands which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first two or three payments I made myself.’ I will ask you to what payments these ‘first two or three payments’ refer, in that letter?

A. It refers to the first payment that Mr. Simpson made.

Q. The first payment that Simpson made?

A. I settled with Mr. Simpson on the note covering the payments, and this letter refers to that settlement.

Q. In other words, now, let us see if I understand you, in your settlements with Mr. Simpson in 1899 you reimbursed him for what he had reimbursed the trust for on the two payments, and the third payment which he had made was included in that settlement; is that correct?

A. Yes.”

On page 12, the appellee says that within a month after Mr. Baker wrote a letter, which followed Examiner Seeley’s report to the Comptroller, he sells this asset to Simpson for less than he paid the state therefor. Thereupon appellee remarks

“How this error, if error it was, occurred is nowhere explained.” The record does explain it perfectly. Harry Meserve was Mr. Baker’s bookkeeper when the first payment was made the state; J. B. Hill was the bookkeeper when the second payment was made the state.

“Q. And Mr. Simpson was to pay you, in addition to what you had paid to the State, fifty dollars for each contract, was that correct?”

A. Yes.

Q. That was your arrangement with him?

A. Yes.

* * * * *

Q. In determining how much you had in these contracts, from whom did you get the information, that is how much the trust had in them, from whom did you get the information?

A. From Mr. Hill, who was the clerk.

Q. He was your clerk and bookkeeper, wasn’t he?

A. Yes.

Q. And to the result given you by Mr. Hill, then you added fifty dollars, is that what I understood you to say was done?

A. Yes.” (Tr. pp. 261, 262.)

On page 63, appellee says that “Probably no officers have so many opportunities to filch as receivers of national banks. The assets are peculiarly

liquid and mutable. Their acts are not subject to approval nor are their accounts submitted to creditors." The testimony is that the character of the examinations of these banks is such that it is impossible to lose sight of any asset, as a strict check is kept by the examiners on everything. (Tr. pp. 275, 339).

On page 71, in referring to the conversations had between Mr. Turner and Mr. Simpson, the appellee says—"Now Turner fixes one of the conversations in 1898", and again the same statement on page 141 where appellee says—"We have already noted that Turner fixes one of these conversations with Simpson as in the year '98." We again call for the record to show appellee's error.

"Q. The Klondike excitement to which you refer was July, 1897?

A. Yes.

Q. And you had the conversation with him after that, did you?

A. Yes.

Q. Can you give the exact time?

A. No, *I cannot*.

Q. Approximately, would you say about what year?

A. I should say 1888 or 1889, or somewhere along there.

Q. You mean 1898-9?

A. 1898-9, yes.” (Tr. pp. 143-144.)

CROSS EXAMINATION OF MR. TURNER.

“Q. The first conversation which you referred to you say was in 1898 or 1899, or thereabouts?

A. *I think so.*

Q. You are not certain as to just which year it was?

A. *No.*

Q. It might have been as late as 1900, might it not?

A. *Possibly; I don't think it was that late, however.*” (Tr. p. 145.)

LACHES

Practically all of the citations produced by appellee and a considerable portion of the entire brief is devoted to meeting the question of laches. Counsel for appellee allege as the basis for their argument “actual fraud proved as here” (Brief, p. 138) and “when a defendant, as here, confesses and yet invokes laches” (Brief, p. 66), and “when truth is confessed or overwhelmingly proved by facts obviously not affected by time” (Brief, p. 67), and “in cases of actual fraud” (Brief, p. 68).

In other words, they assume a state of facts as confessed, and proceeding to argue from that

premises say that Mr. Baker should not be permitted to set up laches as a defense.

It will be borne in mind that Mr. Baker sold this property to Mr. Simpson in November, 1897. He repurchased it in March, 1899. Throughout appellee's brief counsel draw no distinction between the actual bona fide sale to Simpson in '97 and their interpretation of the law as to Baker's legal right to repurchase this property, theretofore rightfully sold, while Baker was yet receiver. Does appellee mean to urge to this court that, when the fact at issue is whether the sale to Simpson was fraudulent or bona fide, Mr. Baker, who testified positively upon this point and was borne out by all the evidence that it was bona fide, should be deprived of the equitable doctrine of laches, simply because, forsooth, the one charging fraud says that if we could prove it it would disclose the fact that you dealt with this estate of which you were trustee, and, therefore, you occupied a fiduciary relation to that estate. All of appellee's argument is based upon the theory that Mr. Baker admits the sale to Simpson as fraudulent and for his own use. We grant the proposition of law that a trustee cannot deal with his own trust. As Mr. Justice Wayne said in the case of *Michoud v. Girod*, 4 How. 552, 11 L.

Ed. 1098, that “persons who were *nominal buyers* of the property for the purpose of conveying it to the executors” must surrender up that property when that fact is proven. But the appellee assumes as a premise for the entire argument upon laches, and as an entire distinction from the rules announced by the court that in a case like that at bar, it is not incumbent upon the one charging fraud to prove when, where and how it was discovered.

The appellee seeks now to justify himself in not even proving the allegations of his bill. He alleges in his bill:

“The facts herein alleged were wholly unknown to any of the *creditors* and *stockholders* of said bank, and to *plaintiff* and the *Comptroller* of the Currency until the year 1913, and were, *until* that time, *concealed* from them by the defendants, as above set forth, and *were first discovered by the Comptroller* of the Currency on or about the *1st day of February, 1913,*” (Tr. p. 12).

Appellee does not attempt to explain why he *failed utterly* to prove a *single fact* relating to the discovery which he says in the bill was made “on or about the 1st day of February, 1913.” We do not know that this is true, and the court has no way of discovering it from the record as there is no proof upon the subject.

In a very labored manner counsel for appellee, seeing the vital character of this omission in the evidence, now say that even if the Comptroller had actual knowledge of fraud, it would not affect the rights of the stockholders and depositors of the bank. They go one step further and say: "The receiver is the instrument of the comptroller," and, therefore, actual knowledge by the receiver would not affect the rights of the stockholders and depositors." (Brief, pp. 44-45).

Laches must arise in the stockholders and depositors, is the claim of appellee. Must it be all the creditors and stockholders or will knowledge by *some* of them be sufficient? Where is the testimony that these hundreds of depositors and stockholders, residing in Seattle all these sixteen years, did not know all these facts all this time, and wait until five principal witnesses were in their graves? Ah, yes; but appellee says in reply to this that Simpson, if alive, could not contradict Baker's own story without making them both ridiculous. But we say, Simpson would not contradict Baker. That's the point at issue.

On page 56 appellee says: "Is a fiduciary to take a trust asset in secret and then debate whether this straw or that should be reckoned knowledge in

those he is trying to deceive?" We deny, and that is the issue in this case, that when Mr. Baker sold to Mr. Simpson in November, 1897, that he had any reserve interest in these contracts, or that he had any expectancy of subsequently acquiring any such interest. The evidence is abundant upon this point. The appellee assumes that Mr. Simpson took the title at that time for Mr. Baker, and that the sale to Mr. Simpson was a mere blind. The appellee now says that *a theory* announced by him without proof *establishes* that Mr. Baker took this trust asset through Mr. Simpson in secret. Mr. Wing had the advantage of talking with Mr. Simpson, and talking with the bankers and business men of Seattle at that time, and evidently reported that the sale was bona fide in every particular just as Mr. Baker says it was.

In this connection we pause to remark that if Mr. Baker was manufacturing a defense why did he fix the time of the repurchase from Mr. Simpson as March, 1899? He could just as well have made that time years after the close of his receivership.

We think that all of the appellee's "fiduciary" and "non-fiduciary" cases, which are so frequently referred to in this distinguishing way, are without

any merit whatsoever, *unless you assume as a fact that which is the very issue in this case*, namely, was the sale to Mr. Simpson in November, 1897, a mere sham, or was it bona fide and without reserved interest in Mr. Baker? This is the issue, and this is the basis upon which Mr. Baker has a full right to call to his defense the equitable doctrine of laches when he is deprived of witnesses, who if living would prove beyond a question the correctness of his position, but now that they are dead he is left shorn of this defense, and they, though silent, are being also charged as participators in a crime, the stain of which must rest upon their memory and be a shame and disgrace to their descendants, because of lineage being through men who, though criminally guilty were fortunate in having death o’ertake them before their offenses should be proven and the shame incident thereto visited upon them.

THE RELATION OF THE STATUTE OF LIMITATIONS TO LACHES

On page 43 of appellee’s brief it is apparently contended that if this action were at law the statute of limitations would not constitute a bar to a recovery by the complainant in the court below.

The patent issued from the State of Washington

to Norton in October, 1905, was immediately placed on record. The contract price to the state had been previously paid by Baker and the taxes up to that date were paid by Norton in August, 1905. All taxes have since been paid by him annually. (Trans. p. 186). In the Seymour case, 53 Wash. 650, and also in the case of *Tremmel v. Mess*, 46 Wash. 137, it was held that the time does not begin to run until the first annual successive payment has been made. Where back taxes are paid in a lump sum, the time does not relate back of the actual payment to the time of accrual of such back taxes. This we concede, but time does begin to run from the date of actual payment if they are followed up thereafter by the regular annual payment of taxes for a period of seven years.

Lara v. Sandell, 52 Wash. 53, 56.

In the case at bar, under the law of Washington the payment made in August, 1905, included with back taxes the current roll which became delinquent on the first day of June, 1905. The statute of limitations began to run with the payment of these current taxes in connection with back taxes. The evidence shows this payment was followed up regularly by the payment of annual taxes for a

period of more than seven years before the commencement of the suit from the date of that first payment. (Tr. p. 186). The deed which issued from the State of Washington more than seven years before the commencement of this suit would be an absolute bar were it not for the allegations of fraud set forth in the complaint. This seven-year statute is intended to foreclose a title against any irregularities. Even a void deed is color of title.

Lara v. Sandell, supra.

The evidence wholly negatives the allegations of the complaint that the court order of sale made at the instance of Seeley was procured through any fraud. If, as the lower court found, the authority to sell did not exist, the seven-year statute is an absolute bar. If the complainant had a right to recover this land upon the facts disclosed by the record of the title for a period of seven years after the issuance of the deed by the State, he cannot now set up some other ground cognizable in equity by means of which an extension of the time will be allowed.

This action might have been commenced as an action at law to recover this property under Section 785 of I Rem. & Ball. Codes & Statutes.

“Any person having a valid subsisting interest in real property and a right to the possession thereof may recover the same by action in the Superior Court of the proper county to be brought against the tenant in possession; if there is no such tenant, then against the person claiming title or some interest therein, and may have judgment in such action quieting or removing a cloud from the plaintiff’s title.”

This section was construed in *Smith v. Wingard*, 3 Wash. Terr. 291, in which Mr. Justice Turner says:

“While the primary object of the law, as we find it in this chapter, is to determine the question of title to the land, that question is to arise, we think, in litigation about the possession of the land. The action therein contemplated is the common-law action of ejectment with the added incident of determining in the action the paramount legal or equitable title and with the departure of permitting the action to be brought against one not in possession but who claims title to or interest in the land. Its chief virtue is that it makes the determination of title *res adjudicata*. The same result was obtained at common law by the action of trespass to try title, as it was called.”

This construction has since been affirmed in *Brown v. Baldwin*, 46 Wash. 106; *Dueber v. Wolfe*, 47 Wash. 634.

If suit had been brought as a law action, there would be no question about its bar by the statute of limitations. The Petticrew case, 61 Wash. 614,

and McDowell case, 72 Wash. 224, cited by the appellee do not have any application to the case at bar.

The complainant, however, apparently seeks to avoid the mandatory effect of the statute of limitations by invoking the doctrine of trusts and pursuing the equity road of procedure to acquire possession with clear title in the place of the law road, which he might have pursued under the Washington practice. He had his choice of remedies, but by taking the equity course he will not be permitted to enlarge his rights by limiting and curtailing the defenses of the defendant.

“Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the Statute of Limitations which govern courts of law in like cases, and this rather in obedience to the Statute of Limitations than by analogy. *Wagner v. Baird*, 7 How. 234. In many other cases they act upon the analogy of the statutory limitations at law, as where a legal title would in ejectment be barred by twenty years adverse possession courts of equity will act upon the like limitation and apply it to all cases of relief sought upon equitable titles or claims touching real estate. *Moore v. Greene*, 2 Curt. 202; 2 Story, Eq. Jur., 8th Ed. 520; *Farnum v. Brooke*, 9 Pick. 243.”

Godden v. Kimmel, 99 U. S. 201, 210, 25 L. Ed. 431.

This language was applied in a later case by

Mr. Chief Justice Fuller, and the word “usually” from the above quotation was stricken out. The following is the language of the learned Chief Justice:

“Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statute of limitations which govern actions at law.”

Metropolitan National Bank v. St. Louis Despatch, 149 U. S. 436.

Reaffirmed in *Baker v. Cummings*, 169 U. S. 189, 205, where it is said:

“As said in *Metropolitan National Bank v. St. Louis Despatch Co.*, 149 U. S. 448: ‘Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern actions at law.’ That Cummings might at his election have pursued a remedy for the alleged fraud in a court of law is obvious. And it is equally clear that such remedy at law, by action on the case predicated on the facts as to deceit and fraud, which are alleged in the bill now before us, would have been barred in three years from the discovery of the fraud under the Statutes of Limitation of Maryland of 1715, chap. 23, § 2, in force in the District of Columbia, 1 Kilty’s Statutes, 111; Comp. Laws. Dist. Col. chap. 42, § 6, p. 360. It hence follows, irrespective of the equitable doctrine of laches, that the relief which the bill seeks to obtain ought not to be allowed by a court of equity.”

It follows that where the statutory period within which an action may be brought has elapsed, facts and circumstances in avoidance of the statute

must be alleged and proved. Fraudulent concealment, fraudulent representations and like conduct have been held in cases of purely equitable cognizance sufficient to extend the statutory period, and in analogy with this equitable doctrine we have the statutory provision in the State of Washington providing that where the action is based on fraud it may be brought within three years after the discovery of the fraud. This statute is but a declaration of the ordinary equity rule with the incident of fixing a definite time.

Equity jurisprudence is a court-made structure to avoid the rigors of the law, but its beneficence can be invoked in those cases only where it is shown that the strict application of legal rules would work injustice. There is no distinction between fiduciary cases and any other kind of a case in the application of this rule. The attempted distinction argued by the appellee, if it exists at all goes only to the degree of proof and not to the principle.

Equity says that a party shall not be permitted to take advantage of the statute of limitations where the lapse of time has resulted from his fraudulent manipulation, but where the facts and circumstances of the fraud are known to the oppo-

site party the bar of time will nevertheless run because in that case there has been no deception. The equity rule withholding the benefit of the statute of limitations is in the nature of an estoppel to set up and claim the benefit of the statute. Such an estoppel cannot exist where there is knowledge of the facts.

It is contended by the appellee that the burden is upon us to show when *they* came into possession of the facts constituting the basis of this action. We have shown that at law the action was barred by lapse of time. We have shown that by analogy if the action is one purely in equity, the length of time has run which equity courts declare a bar by application of the doctrine of laches. To avoid this application of the law rule to suits in equity the complaint alleged that the complainant did not come into possession of the facts until the year 1913, but produced no evidence in support of this averment. The complainant must have come into possession of the facts at some time before he prepared his complaint. When he acquired and how he acquired knowledge of these facts is matter peculiarly within his ability to show. If equity procedure were to require us to show when our opponents acquired this knowledge, it would amount

to giving them the benefit of equity's beneficence without requiring them to comply with the burden of showing the facts peculiarly within their knowledge upon which that beneficence is based. To require us to show when they got possession of the facts which they plead in their bill would amount practically to a denial to us of the benefit of lapse of time which both the law and equity recognize as a sound and meritorious defense, a defense grounded in public policy.

There should be no confusion of the rule relative to equitable avoidance of lapse of time as a bar when applied in analogy to the statute of limitations and equitable estoppel which may be supplied regardless of the lapse of time. There are cases which hold where equitable estoppel is relied upon as a ground of defense it is incumbent upon the pleader of such estoppel to aver and prove all the facts constituting the estoppel.

Where the statutory period has elapsed and the remedy would be defeated by the statute of limitations if the action were at law, and by analogy by the lapse of the same period as constituting laches if the action is in equity, then it becomes incumbent upon the party claiming exemption from the effect of the lapse of time to prove all the facts

entitling him to the exemption. This proposition is supported by all the cases, fiduciary and non-fiduciary.

The appellee has cited and apparently relies upon some cases where the acquisition of a title by fraudulent means has been confessed by a demurrer or directly by answer and estoppel is relied upon as a defense. That class of cases can have no application here.

The argument that this was an express trust manifestly defeats its own purpose. If Baker took this contract to hold as an express trust, he repudiated such express trust as soon as he made a conveyance to Simpson, whether such conveyance was made for his own use or for Simpson's use, and in that case the statute would begin to run from the date of the conveyance.

It would serve no useful purpose to review in detail the points made in our opening brief or to discuss in detail the cases cited by the appellee.

THE COMPLAINANT'S RIGHT TO ACQUIRE THIS PROPERTY

The appellee attempts to avoid a fundamental proposition in this case, to the effect that the administrators of this trust are attempting to bring

into the trust fund by means of this suit property which the law forbids them to acquire, by asserting that the acquisition of this property will give added value to the upland previously acquired by the Bank. The Supreme Court of the United States answered a similar fallacy in the Converse case, where it was attempted to justify the acquisition of corporation stock at protecting a previous investment. It is sufficient answer to say that the law does not authorize any investment for any such purpose.

But in this case we have the additional fact that the making of this contract was not intended for any such purpose because both the Receiver and the Comptroller expressed the view at the time that it was a profitable speculation and that the intention was to sell the block or the right to the block, which the map shows is separated from the upland property by other tideland blocks and intervening streets.

Respectfully submitted,

B. S. GROSSCUP,
W. C. MORROW,
CORWIN S. SHANK,
HORATIO C. BELT,

Solicitors for Appellants.

